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Appendix A

Philip D. CANCELLIER, John W. Costello and Zelma Smith Ritter,
Plaintiffs-Appellants/Cross-Appellees,

v.

FEDERATED DEPARTMENT STORES d/b/a I. Magnin,
Defendant-Appellee/Cross-Appellant.

Nos. 81-4154, 81-4165.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 16, 1981.
Decided March 30, 1982.

Robert S. Daggett, Brobeck, Phleger & Harrison, San Francisco, Cal., argued, for plaintiffs-appellants/cross-appellees (sic); Donald D. Connors, Brobeck, Phleger & Harrison, San Francisco, Cal., on brief.

Maureen McClain, Littler, Mendelson, Fastiff & Tichy, San Francisco, Cal., for defendant-Appellee/cross-appellant (sic).

Appeal from the United States District Court for the Northern District of California.

Before SNEED and PREGERSON, Circuit Judges, and EAST*, District Judge.

*sitting by designation.

SNEED, Circuit Judge:

The plaintiffs below and appellants here, Philip D. Cancelier, John W. Costello, and Zelma Smith Ritter, are former employees of I. Magnin, the defendant below and cross-appellant here. They won a jury verdict in the district court totalling $1.9 million, plus court-awarded attorneys' fees of $400,000, on their claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1976 & Supp. II 1978) and pendent state claims. They appeal denial of their motions for reinstatement and for an injunction against I. Magnin. I Magnin cross-appeals the judgment primarily on grounds of improper ADEA instructions, use of a general verdict, and an erroneous award of compensatory and punitive damages for breach of the implied covenant.[1] We affirm.

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1. I. Magnin also includes numerous other grounds in its appeal including failure to instruct on constructive discharge, failure to properly instruct on the method of calculating ADEA and breach of contract damages, partisan conduct, incorrect evidentiary rulings, incorrect award of attorneys' fees, failure to grant I. Magnin's motions for new trial or remittitur, and failure to grant I. Magnin's pretrial motion for separate trials.

I.
FACTS

Plaintiffs-appellants are former executives of I. Magnin. Cancellier was vice president for stores and operations. Costello was divisional merchandise manager for accessories. Ritter was a buyer of sportswear. In early 1978 they were terminated after having been employed at I. Magnin for twenty-five, seventeen, and eighteen years, respectively. In July 1979 they brought this action in the United States District Court for the Northern District of California alleging that their terminations violated the ADEA. They sought back pay, liquidated damages, reinstatement to their former positions, and an injunction against further age discrimination at I. Magnin. Appellants also raised claims

under California law for breach of employment contract and breach of the implied covenant of good faith and fair dealing. Costello sought additional relief claiming fraud in connection with a promise of future employment at I. Magnin.

After a six-week trial the jury returned general verdicts in favor of Cancellier in the amount of $800,000, Costello in the amount of $600,000, and Ritter in the amount of $500,000. The jury also returned verdicts in favor of I. Magnin on Costello's fraud claims. Both sides appeal. For convenience, I. Magnin's cross-appeal is discussed first.

II.

I. MAGNIN'S CROSS-APPEAL

A. *ADEA "Determining Factor" Standard*

The ADEA makes it unlawful for an employer to discharge any individual because of such individual's age. 29 U.S.C. § 623(a) (1976). In *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984-85 (9th Cir. 1981), this court set out the requirements for a proper jury instruction on age discrimination. We adopted the "determining factor" test established in *Laugesen v. Anaconda*, 510 F.2d 307, 317 (6th Cir. 1975), and restated as a "but for" test in *Loeb v. Textron*, 600 F.2d 1003, 1019 (1st Cir. 1979). We rejected the argument that plaintiff must prove age was the sole factor in his discharge, and upheld a jury instruction stating that plaintiff has the burden of proving that one of the reasons he was terminated was because of his age, and that he should prevail if this factor "made a difference" in determining whether the plaintiff was retained or discharged.[2]

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2. The jury instruction summarized in *Kelly* is set out at greater length below.

INSTRUCTION NO. 9

The plaintiff has the burden of proving:

(1) that one of the reasons he was terminated was because of his age; and

(2) that as a result of the termination, he has suffered damage.

[1,2] The essence of a proper jury instruction under *Kelly* is that it require the jury to focus on the marginal effect of the age factor. Age need not be the sole factor in a discharge or other discriminatory practice. Conversely, it is not enough that age discrimination be present or even that it figure in the decision to fire; age must "make a difference" between termination and retention of the employee in the sense that, but for the presence of age discrimination, the employee would not have been discharged.

[3] Here the district judge instructed the jury that "[a]ge must be a determining factor in an employer's personnel policies or practices before violation of the Act occurs." The district judge completely failed to give any guidance as to the meaning of "determining factor" in lawsuits under the ADEA, or to refer to the *Laugesen* and *Loeb* test we adopted in *Kelly v. American Standard, Inc.* This was error. The words "determining factor" are not self-explanatory. In general, fair application of the Act requires the trial judge to formulate precisely what employer conduct the ADEA redresses and what employer conduct it leaves undisturbed. Because the attribute with which the statute is concerned comes to each of us in time, it will inevitably be present in a multitude of employee discharges. It will be a factor in many and a determining factor in some. It is only this last group that can obtain

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Title 29, Section 623(f), United States Code, provides that it shall not be unlawful for an employer to discharge any individual from his employment, or classify his employees in any way, for good cause or where the discharge or classification is based on reasonable factors other than age.

You are instructed that there may be more than one factor in defendant's decision to terminate the plaintiff's employment; but plaintiff is nevertheless entitled to recover if one such factor was his age and if, in fact, it made a difference in determining whether or not the plaintiff was retained or discharged . . . .

See Kelly v. American Standard, Inc., 640 F.2d 974, 984-85 (9th Cir. 1981).

relief under the ADEA, even though, in the broad sense, it aims to benefit the entire aged employment force.

[4] [However, a careful reading of the transcript and record convinces us that in this case the instruction does not require reversal. Giving it was harmless error. There is little or no indication in the proceedings that the outcome would have changed if the *Kelly* jury instruction had been given. This case was not decided by a hairsbreadth. There was ample evidence that consideration of age "made a difference" in the termination of Cancellier, Costello, and Ritter. Moreover, it was conceded at oral argument that the challenged instruction was fashioned by the judge from language submitted by I. Magnin. While we are extremely reluctant to affirm verdicts based on jury instructions different from those approved in *Kelly* or their equivalent,[3] we find that on the facts of this case refusing a new trial is consistent with substantial justice. Fed.R.Civ.P.61; *Ginsburg v. Ginsburg*, 276 F.2d 94, 96 n.2 (9th Cir. 1960); 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 61.11 & n.1a (2d ed. 1979). The instruction aproved in *Kelly* adequately protects against mistaken inferences either that age must be the sole factor in the discharge, or that age may be less than a "but for" cause of the discharge. It is strongly preferred. Here, however, we find the error harmless.] [*See* Amendment, Appendix B.]

B. *Use of General Verdict*

I. Magnin contends that the district court committed reversible error by using simple general verdict forms without requiring special interrogatories or any breakdown of the verdict by source of damages.[4] Thus, I. Magnin contends, the possibility of punitive damages not recoverable

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3. *See* note 2 *supra*.

4. The ADEA's proscription against age discrimination is enforced through express incorporation of the Fair Labor Standards

under the ADEA in this lawsuit[5] or of duplicative damages in the pendent state claims requires a new trial.

[5, 6] Submission of special interrogatories is a matter committed to the discretion of the district judge. Fed.R. Civ.P. 49(b); *Monsma v. Central Mutual Insurance Co.*, 392 F.2d 49 (9th Cir. 1968); 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 49.04 & n.3 (2d ed. 1981). A jury

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Act, 29 U.S.C. §§ 201-219 (1976), rather than through independent ADEA remedies. The ADEA provides at 29 U.S.C. § 626(b) that

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of section 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter....

Section 216(b) in turn makes employers liable for unpaid minimum wages or unpaid overtime compensation and "an additional equal amount as liquidated damages."

Thus, an employer who violates the ADEA is liable for back wages and benefits, as well as an additional equal amount as liquidated damages for willful violations. *Kelly v. American Standard, Inc.*, 640 F.2d 974, 978 (9th Cir. 1981). The award of liquidated damages is in effect a substitute for punitive damages and is intended to deter intentional violations of the ADEA. *Id.* at 979; *Dean v. American Security Insurance Co.*, 559 F.2d 1036, 1039-40 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066, 98 S.Ct. 1243, 55 L.Ed. 2d 767 (1978); *Douglas v American Cyanamid Co.*, 472 F.Supp. 298, 303 (D.Conn.1979).

5. The Fourth and Fifth Circuit Courts of Appeal have denied recovery for punitive damages, *see Walker v. Pettit Construction Co.*, 605 F.2d 128, 129-30 (4th Cir. 1979); *Dean v. American Security Insurance Co., supra*, although some federal district courts have held punitive damages are available, *see, e.g., Kennedy v. Mountain States Telephone & Telegraph Co.*, 449 F.Supp. 1008, 1009-11 (D.Colo. 1978). *See also Kelly v. American Standard, Inc.*, 640 F.2d at 983 & n.14 (citing cases). The availability of punitive damages under the ADEA is not an issue in this case, since the judge instructed the jury that punitive damages were not available, Reporter's Transcript 4079, and the parties have not objected to that instruction.

generally is not required to itemize the components that enter into an award of damages. *Neal v. Saga Shipping Co.*, 407 F.2d 481, 489 (5th Cir.), *cert denied*, 395 U.S. 986, 89 S.Ct. 2143, 23 L.Ed.2d 775 (1969), *cited in Frito-Lay, Inc. v. Local 137, International Brotherhood of Teamsters*, 623 F.2d 1354, 1365 (9th Cir. 1980), *cert. denied*, 449 U.S. 1013, 101 S.Ct. 571, 66 L.Ed.2d 472 (1981), *and cert. denied*, 448 U.S. 1112, 101 S.Ct. 922, 66 L.Ed.2d 841 (1981) (district court sitting as trier of fact not required to itemize damage award).

[7] When state claims for breach of the implied covenant of good faith and fair dealing are joined to claims of age discrimination under the ADEA, however, review of jury verdicts presents special difficulty to appellate courts. A general verdict may conceal punitive damages which may not be allowed under the ADEA. If the state claims are flawed, the entire verdict may have to be reversed. For these reasons, a separate verdict for each claim and a separate verdict on punitive damages is strongly preferred.

[8] Nevertheless, failure to submit special interrogatories was not an abuse of discretion. *See supra* p. 1317. The amounts awarded here are consistent with a reasonable award on the ADEA and pendent state claims. We find no reversible error. I. Magnin's claim that it is impossible to tell which plaintiffs prevailed on which of their claims is unpersuasive. The court submitted general verdict forms in favor of the defendant on each claim. The jury returned general verdict forms in favor of I. Magnin on Costello's fraud claim and Costello's negligent misrepresentation claim; clearly, all other claims were resolved in favor of the plaintiffs. The verdict is clear as to which plaintiffs prevailed on which claims.

C. *Tort Damages for Breach of the Implied Covenant*

Breach of the implied covenant

I. Magnin contends that a claim for breach of the implied covenant under the circumstances here is contrary to California law. The contention is without merit.

[9, 10] California law recognizes an implied covenant of good faith and fair dealing in certain contracts that neither party will do anything to deprive the other of the benefit of the contract. *See, e.g., Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566, 578, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973) (en banc); *Comunale v. Traders & General Insurance Co.*, 50 Cal.2d 654, 658, 328 P.2d 198 (1958). California courts have recently applied the duty created by the implied covenant to the situation where the employee alleges no more than long service and the existence of personnel policies or oral representations showing an implied promise by the employer not to act arbitrarily in dealing with its employees. Such claims sound in both contract and tort and may give rise to emotional distress damages and punitive damages. *Pugh v. See's Candies, Inc.*, 116 Cal.App.3d 311, 171 Cal.Rptr. 917 (1981); *Cleary v. American Air Lines*, 111 Cal.App.3d 443, 168 Cal.Rptr. 722 (1980) (alternative holding). *See Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 179 n.12, 164 Cal.Rptr. 839, 610 P.2d 1330 (1980) (dicta). *Cf.* Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 Stan.L.Rev. 153 (1981) (arguing against application of implied covenant to employment context).

Preemption

[11-13] The ADEA does not preempt the award of tort damages on pendent state claims. *Kelly v. American Standard, Inc.*, 640 F.2d 974, 983 (9th Cir. 1981) (upholding emotional distress damages under state age discrimination statute). The award of tort damages on state claims here did not duplicate ADEA relief. Plaintiffs' ADEA claims were based on age discrimination in firing. Plaintiffs' con-

tract and covenant claims were based on I. Magnin's obligation not to deal arbitrarily or unfairly in terminating plaintiffs' employment, an obligation created by I. Magnin's personnel policies and the fact of long service by the employee.[6] Punitive and emotional distress damages for this violation, unavailable under the ADEA,[7] do not duplicate the ADEA award for back pay, lost benefits, and liquidated damages. While the wisdom of allowing open-ended state claims for breach of the implied covenant to coexist with ADEA claims whose financial redress Congress has carefully limited to specific damage elements, see 29 U.S.C. § 626(b) (1976); *Kelly v. American Standard, Inc.*, 640 F.2d at 983 n.14, is arguable, it is for Congress, not us, to decide whether state common law remedies trench too closely on the federal scheme. Pendent jurisdiction, of course, is a doctrine of discretion. We recognize that in appropriate circumstances dismissal of the state claims without prejudice is proper. *United Mineworkers v. Gibbs*, 383 U.S. 715, 726-27, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). Such circumstances may exist, for example, where the trial judge finds that the state issues predominate in terms of the comprehensiveness of the remedy sought, or that there is a sufficient likelihood of jury confusion in treating divergent legal theories of relief to justify separating state and federal claims. *Id.*

Notice

[14] I. Magnin contends that it did not have notice of plaintiffs' claims for *tort* (as opposed to *contract*) dam-

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6. These claims do not depend on age. Thus, while the requirement of long service makes it more likely that successful plaintiffs will be advanced in years, claims by plaintiffs who are outside the ADEA-protected age range of from forty to seventy years are certainly possible—*e.g.*, a suit by a thirty-seven year old plaintiff with twenty years of service.

7. *See* note 4 *supra*.

ages flowing from a breach of the implied covenant. Although the general verdict prevents us from determining with certainty the amount of punitive damages, they necessarily make up a significant portion of the award.[8] But the complaint alleging breach of the covenant implied in each plaintiff's employment contract was sufficient notice of plaintiffs' claim. No specific prayer for emotional distress or punitive damages is needed. A final judgment must grant the relief to which the prevailing party is entitled, "even if such party has not demanded such relief in his pleadings." Fed.R.Civ.P. 54(c). Moreover, plaintiffs' pretrial statement itemized the emotional distress and punitive damages sought. On these facts, I. Magnin's claim of inadequate notice is without merit.

Punitive damages

[15, 16] A jury may award punitive damages if it finds by a preponderance of the evidence that defendant was guilty of malice, oppression, or fraud. Cal.Civ.Code § 3294 (West 1981); *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 819, 169 Cal.Rptr. 691, 620 P.2d 141 (1979). It is a question for the jury whether defendant's conduct was fraudulent, malicious, or oppressive. *Id.* at 821, 169 Cal.

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8. The $1.9 million verdict exceeds the maximum allowable award for back pay and benefits under the ADEA consistent with the evidence by approximately $640,000. Thus, $640,000 is the minimum amount that could have been awarded as punitive (or pain and suffering) damages on pendent state claims.

Plaintiffs' expert witness presented evidence claiming back pay and benefits in the amount of $338,786 for Cancellier, $231,730 for Costello, and $197,097 for Ritter. Plaintiffs' Trial Exhibit 52. If, after deductions of $70,000, $22,500, and $47,500 for severance pay and interim earnings, Plaintiffs' Responding Brief 48-49, the jury doubled these amounts in an award of liquidated damages, then punitive damages on pendent state claims must have been awarded in amounts of approximately $260,000, $180,000, and $200,000, respectively. *See supra* p. 1315; Plaintiffs' Responding Brief, *supra*. Actual punitive damages may have been higher. *See* Defendant's Opening Brief 45 n.38.

Rptr. 691, 620 P.2d 141. The evidence before the jury adequately supported a finding against I. Magnin on the issue of punitive damages.

D. *Other Alleged Errors*

I. Magnin's additional claims of error are without merit.[9] A thorough review of the record below establishes that the trial was fairly and properly conducted.

III.

APPEAL OF CANCELLIER, COSTELLO, AND RITTER

A. *Reinstatement and Injunction*

[17, 18] The ADEA provides that "in any action brought to enforce [the Act] the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate . . . including without limitation judgments compelling employment, reinstatement or promotion . . . ." 29 U.S.C. § 626(b) (1976). Reinstatement is not a mandatory remedy; it lies within the discretion of the trial court after careful consideration of the particular facts of the case. *Combes v. Griffin Television, Inc.*, 421 F.Supp. 841, 846 (W.D.Okl.1976). Ordinarily a verdict for plaintiff on the age discrimination claim is *res judicata* on plaintiff's equitable reinstatement claim. *Cleverly v. Western Electric Co.*, 450 F.Supp. 507, 511 (W.D.Mo.1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). However, courts have refused to grant reinstatement where the employer continued a reduction in force for permissible business reasons, *id.*, or where discord and antagonism between the parties made it preferable to fashion relief from other available remedies, *Combes v. Griffin Television, Inc., supra*, at 846-47.

[19] Damages in lieu of reinstatement may be awarded

9. *See* note 1 *supra*.

in addition to liquidated damages. However, the value of reinstatement is often speculative.[10] Thus, availability of a substantial liquidated damages award may be a proper consideration in denying additional damages in lieu of reinstatement. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1021-23 (1st Cir. 1979).

[20] The trial judge in this case denied reinstatement because he found evidence of acrimony in the record and because he was "fully satisfied that [the verdict] has made the plaintiffs whole." Clerk's Record 124. The court noted the testimony of an I. Magnin officer who referred to plaintiff Ritter as a "cancer." I. Magnin's numerous attacks during the trial on plaintiffs' abilities support the trial judge's conclusion that plaintiffs and I. Magnin could no longer "co-exist in a business relationship that would be productive to the consumer, community or to the business itself." Clerk's Record 125. By virtue of his position in conducting the trial, the judge was peculiarly well-situated to observe the demeanor of plaintiffs and defendants in making this determination. Moreover, in view of the substantial verdict the judge did not abuse his discretion in finding that it had made the plaintiffs whole.

[21] Like the reinstatement remedy, injunctive relief is available under the ADEA when appropriate. The trial judge found that the $2.3 million judgment against I. Magin, including attorneys' fees, was sufficient to discourage I. Magnin from practicing age discrimination in the future. This finding was not an abuse of discretion.

B. *Attorneys' Fees on Appeal*

[22] A grant of fees on appeal is within the discretion

10. A possible exception would be cases involving the breach of employment contracts of specified duration.

of the appellate court. *Kelly v. American Standard, Inc.*, 640 F.2d 974, 986 (9th Cir. 1981). Although plaintiffs did not prevail on their reinstatement and injunction claims, an award of fees on appeal in some amount is appropriate to reflect successful defense of the verdict below. *See id; Cleverly v. Western Electric Co.*, 594 F.2d 638, 642 (8th Cir. 1979) (fees awarded to plaintiff denied reinstatement). We remand to the district court for a determination of the proper amount.

IV.

CONCLUSION

While the instructions approved in *Kelly v. American Standard, Inc., supra,* and separate verdict forms for each claim, as well as a separate verdict form for punitive damages, are preferred, the trial judge did not commit reversible error in instructing the jury on "determining factor" under the ADEA, in using a general verdict, or in allowing tort damages on pendent state claims. Nor was denial of plaintiffs' motions for reinstatement and for injunctive relief against continuing age discrimination at I. Magnin an abuse of discretion. Plaintiffs are entitled to reasonable attorneys' fees in light of the outcome on appeal. The judgement of the district court is affirmed.

AFFIRMED.

Appendix B

Filed—May 27 1982
Phillip B. Winberry
Clerk, U.S. Court of Appeals

In the
United States Court of Appeals
For the Ninth Circuit

Nos. 81-4154, 81-4165

PHILIP D. CANCELLIER, JOHN W. COSTELLO
and ZELMA SMITH RITTER,
Plaintiffs-Appellees/Cross-Appellants,

v.

FEDERATED DEPARTMENT STORES d/b/a I. MAGNIN,
Defendant-Appellant/Cross-Appellee.

ORDER

Before: SNEED and PREGERSON, Circuit Judges
and EAST*, District Judge

The panel as constituted in the above case has voted to amend its March 30, 1982 opinion by inserting in place of the paragraph beginning on page 4, line 12, and ending on page 5, line 2, of the slip opinion the following paragraphs:

> An erroneous ruling which relates to the substantial rights of a party is grounds for reversal unless it affirmatively appears from the whole record that it was not prejudicial. *McCandless v. United States,* 298 U.S. 342, 347-48 (1936). This is especially true of an

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

error in jury instructions. *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919). However, a careful reading of the transcript and record convinces us that in this case the instruction does not require reversal. Giving it was harmless error.

There is no indication in the proceedings that the outcome would have changed if the *Kelly* jury instruction had been given; to the contrary, it affirmatively appears from the record that the instruction did not prejudice defendant. This case was not decided by a hairsbreadth. There was ample evidence that consideration of age "made a difference" in the termination of Cancellier, Costello, and Ritter. *Cf. Van Domelen v. Westinghouse Electric Corp.*, 382 F.2d 385, 387 (9th Cir. 1967) (ample evidence of forbearance); *TSS Sportswear, Limited v. Swank Shop (Guam), Inc.*, 380 F.2d 512, 522, 523 (9th Cir. 1967) (overwhelming support in record for result below). Unlike the instructions given in cases requiring reversal, which affirmatively stated an erroneous version of the law, *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 420-21 (1926); *Fillipon, supra* at 83-84, or forbade the jury to consider what it properly should have considered, *McCandless, supra* at 345, the trial judge's instruction here was merely an unelaborated version of the correct standard. Significantly, the challenged instruction was fashioned by the judge from language submitted by I. Magnin.

While we are extremely reluctant to affirm verdicts based on jury instructions different from those approved in *Kelly* or their equivalent,[3] we find that on the facts of this case refusing a new trial is consistent with substantial justice. Fed. R. Civ. P. 61; *Ginsburg*

v. Ginsburg, 276 F.2d 94, 96 n.2 (9th Cir. 1960); 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 61.11 & n.1a (2d ed. 1979). The instruction approved in *Kelly* adequately protects against mistaken inferences either that age must be the sole factor in the discharge, or that age may be less than a "but for" cause of the discharge. It is strongly preferred. Here, however, where the record convincingly rebuts any presumption of prejudice, we find the error harmless.

With the opinion so amended, the panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix C

In the

United States Court of Appeals

For the Ninth Circuit

Nos. 81-4154, 81-4165

PHILIP D. CANCELLIER, JOHN W. COSTELLO
and ZELMA SMITH RITTER,
Plaintiffs-Appellants/Cross-Appellees,

v.

FEDERATED DEPARTMENT STORES d/b/a I. MAGNIN,
Defendant-Appellee/Cross-Appellant.

PETITION OF DEFENDANT-APPELLEE/CROSS-APPELLANT FEDERATED DEPARTMENT STORES, INC. d/b/a I. MAGNIN FOR REHEARING WITH A SUGGESTION OF THE APPROPRIATENESS OF REHEARING EN BANC

PRELIMINARY STATEMENT AND CERTIFICATE OF COUNSEL

I. Magnin respectfully petitions for rehearing, and suggests the appropriateness of rehearing *en banc*, of a single issue, *viz.*, was not the error[1] committed by the district court in instructing the jury prejudicial to Magnin's substantial rights, rather than harmless as the opinion says? That question has never been briefed or argued anywhere in the litigation, yet the holding of the Panel on it is the

1. After careful discussion of the ADEA liability instruction the court below gave the jury, the Court said (Op., p. 3), "This was error."

sole foundation for this Court's judgment against Magnin. Both sides assumed in their briefs and at the argument that if Magnin's contentions about error in the jury instructions were accepted by the Court, as they *were* in the opinion, that the judgment would be reversed. Plaintiffs confined themselves to submitting that the instruction on liability for age discrimination under the ADEA was in all respects correct (see Pl. Resp. Br., p. 11). Hence the Court has yet to hear from counsel on whether the errors of the district court, emphatic yet careful discussion of which takes up the bulk of the opinion, were prejudicial or harmless.[2]

We certify[3] to our belief that the decision of the Panel filed March 30, 1982:

> (1) While holding emphatically that the court below committed error by "completely fail(ing) to give (the jury) any guidance as to the meaning of (the) 'determining factor'" finding the jury had to make before returning any ADEA verdict for plaintiffs, and holding just as emphatically that the district court went against the strong preference of the law in this Circuit in permitting the jury to find for plaintiffs on general verdicts rather than submitting separate verdicts on the state and federal claims (and on punitive

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2. While the Court used the flat language of error when it discussed the jury instructions, and in describing submission of the general verdicts used slightly different language—that use of general verdicts here violated or departed from a strong preference of the law in cases like this one—we also are aware that the opinion uses the words "strongly preferred" (Op., 5:1, 5:32) to describe what the court below should have done in respect of both instructions and the general verdict. We refer to both as error because we believe the Court intended to admonish the District Courts that what was done here must not be repeated in future cases.

3. Pursuant to F.R.A.P., Rule 40, and the instruction in the Notice of Entry of Judgment.

damages), the Panel also decided that what occurred was harmless error requiring no new trial—and we submit that in so deciding the Panel overlooked decisions of both this Court and the Supreme Court on the test for prejudicial or harmless error in jury instructions;

(2) While the opinion treats in the traditional fashion as separate issues (a) the error of the Court below in instructing the jury and (b) the unwisdom of permitting the jury to return general verdicts which lumped decision of federal and state claims together, in so doing the Panel overlooked the *cumulative* effect of both errors and that "their cumulative effect was prejudicial," *Gordon Mailloux Ent. v. Fireman's Ins. Co. of Newark, N.J.*, 366 F.2d 740, 742 (9 Cir. 1966), *Northern Pacific Railway v. Herman*, 478 F.2d 1167 (9 Cir. 1973), because the jury in this case, spurned in its plea for further instruction on age discrimination under ADEA, inevitably found that I. Magnin violated ADEA not upon the federal standard which governs ADEA liability, but upon a different, prejudicial standard of California law for liability for employee terminations the jury thought to be unfair; and

(3) In treating the errors as harmless and hence to require no new trial—through an opinion which treated them as separate and distinct for purposes of traditional appellate review and analysis rather than as errors which cumulated or coagulated at the trial into overall prejudicial error—the decision has created a dangerous new doctrine of harmless error for ADEA age discrimination cases and thus failed to accomplish its implicit statement of purpose to clarify the law in this Circuit for ADEA cases tried to District Court juries in the future.

THE UNBRIEFED AND UNARGUED RATIONALE FOR THE JUDGMENT AGAINST MAGNIN— AND HOW THE ERRORS THE COURT FOUND COMBINED WITH EACH OTHER TO PREJUDICE MAGNIN'S SUBSTANTIAL SUBSTANTIVE RIGHTS

The judgment of this Court against Magnin, as we stated at the outset, rests upon the ultimate conclusion that the errors the court below committed were harmless. Since both sides assumed in both their briefs and arguments that the error Magnin claimed in the ADEA instructions would be reversible error, the question of reversible or harmless error has never been addressed by counsel, yet the ultimate conclusion and judgment of the Court rests upon it.

Although the opinion insists that the District Courts refrain in the future from giving the ADEA liability instructions the court below gave the jury here and give, instead, an instruction conforming with *Kelly,* and warns no less pointedly of the future consequences of failure to submit separate jury verdicts on federal, state and punitive damage claims, we believe that the opinion also has created a new doctrine of harmless error for federal age discrimination cases under the ADEA which will be just as dangerous in future age litigation in the District Courts as the errors the opinion so capably identifies and discusses. There should be no special rules for ADEA cases, of course. And this means not only that there must be no special body of law creating new or unfamiliar obstacles to recovery for violation of ADEA *but also that settled law on determination of the harmless or prejudicial nature of error in civil cases, and the right to a new trial for a litigant whose substantial rights have been prejudiced on matters of substance, must be applied equally to federal age cases as in all other civil litigation.* There is nothing in ADEA, which admittedly

intrigues with new questions over an "attribute *** which *** comes to each of us in time,"[4] to inspire a new doctrine of harmless error to brush aside errors of the magnitude found by the Court here—no matter how this Court views, or the District Courts in other cases may view, the weight of the evidence against the defendant. There is nothing in the ADEA to justify or require a departure from settled principles which would have entitled I. Magnin to a new trial in another kind of case as a result of the prejudice to its substantial rights from the errors here.

It is for these reasons that we suggest, with deference, the appropriateness of rehearing *en banc*.

The opinion of the Court and the judgment it entered stand in sharp contrast with each other. The opinion of the Panel[5] identifies and discusses the missteps of the district court in language more powerful than that used by the Court in other cases to reverse a judgment. Each of Magnin's main submissions on appeal is upheld in the opinion. We have no doubt that the discussion in the opinion of "determining factor" and the need for separate verdicts will be a landmark and the source of governing law in this Circuit and elsewhere for years to come in jury trials of age discrimination cases, but its view that the errors on those matters were harmless in this case is likely to be dangerous. Before turning to the way in which Magnin's submissions adopted by the Court show reversible error when viewed *together* as they occurred at the trial rather than separately in the traditional manner of an appellate opinion, we take the language of the opinion itself to de-

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4. Op., p. 4.

5. One of whose members at argument questioned us relentlessly on whether or not we did everything we could have done at the trial to warn the district court away from the errors this Court's opinion finds. As to this, see *infra*, pp. 8-9.

scribe what occurred and the reasons the Panel gave in warning that what occurred must not occur again in an ADEA jury case in this Circuit.

The Error in the Determining Factor Instructions[6]

The opinion says (pp. 3-5):

> "Here the district judge instructed the jury that '(a)ge must be a determining factor in an employer's personnel policies or practices before violation of the Act occurs.' *The district judge completely failed to give any guidance as to the meaning of 'determining factor' in lawsuits under the ADEA,* or to refer to the *Laugesen* and *Loeb* test we adopted in *Kelly v. American Standards, Inc. This was error.* The words 'determining factor' *are not self-explanatory.* In general, fair application of the Act requires the trial judge to formulate precisely what employer conduct the ADEA redresses and what employer conduct it leaves undisturbed. Because the attribute with which the statute is concerned comes to each of us in time, it will inevitably be present in a multitude of discharges. *It will be a factor in many and a determining factor in some. It is only this last group that can obtain relief under the ADEA,* even though, in the broad sense, it aims to benefit the entire aged employment force.***
>
> "**** While we are extremely reluctant to affirm verdicts based on jury instructions different from those approved in *Kelly* or their equivalent, we find that on the facts of this case refusing a new trial is consistent with substantial justice. Fed. R. Civ. P. 61; *Ginsburg v. Ginsburg,* 276 F.2d 94 (9th Cir. 1960); 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 61.11 & n.1 (2d ed. 1979). *The instruction approved in Kelly adequately protects against mistaken inferences either that age must be the sole factor in the discharge, or that age may be less than a "but for" cause of the discharge. It is strongly preferred."*

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6. Emphasis in matter quoted here has been supplied.

Error in Permitting the Jury to Return General Verdicts

The Court said (Op, p. 5):

> "When state claims for breach of the implied covenant of good faith and fair dealing are joined to claims of age discrimination under the ADEA, however, *review of jury verdicts presents special difficulty to appellate courts.* A general verdict may conceal punitive damages which may not be allowed under the ADEA. *If the state claims are flawed, the entire verdict may have to be reversed. For these reasons, a separate verdict for each claim and a separate verdict on punitive damages is strongly preferred.*"

The Cumulative Prejudicial Effect of These Errors: The State Claims Truly Flaw the ADEA Verdict Here

Simply put, the erroneous instructions, which "completely failed to give any guidance as to the meaning of 'determining factor'," permitted the jury to find, and the record shows the jury did find, damages against Magnin for ADEA age discrimination upon a California law standard for recovery of tort damage for breach of an implied covenant of fair dealing different and looser than what is required to recover for violation of the federal statute; *and since the form of verdict makes it impossible to hold that the jury did not substitute the implied covenant liability standard in deciding the ADEA age case, as separate verdicts might have done, the error must be regarded by this Court as prejudicial to Magnin's substantial rights and hence to require reversal.*

We do not here explicate again the content and shortcomings of the ADEA determining factor instruction given by the district court, because the words of the opinion quoted above do that exactly. But we do call urgent atten-

tion to the instructions the district court gave the jury on breach of the implied covenant (R. Tr. 4086-4087):

> "This duty of good faith and fair dealing forbids either party from *doing anything* which will interfere with the right of the other to receive the benefits of the agreement. The implied duty imposes on each party the obligation to do everything that the contract presupposes they will do to accomplish its purposes.
>
> *"Liability for an employer's breach of the duty of good faith and fair dealing is imposed for failure of the employer to act in good faith and to deal fairly* rather than arbitrarily in the performance of its obligations under an employment contract so as not to frustrate the purpose of the employment contract or to deny to the employee the benefits of such a contract.
>
> "It is not necessary to prove actual dishonesty, fraud or concealment in order for a plaintiff to recover damages for breach of the implied duty of good faith and fair dealing.
>
> "Each plaintiff contends that I. Magnin breached its covenant of good faith and fair dealing. If you find that a plaintiff failed to prove that I. Magnin breached its covenant of good faith and fair dealing, then you must return a verdict for defendant I. Magnin on that plaintiff's breach of covenant claim.
>
> *"If you find that a plaintiff has proved by a preponderance of the evidence that I. Magnin did, in fact, breach its covenant of good faith and fair dealing, then you may return a verdict for that plaintiff on his or her breach of covenant claim."*

Within minutes after the jury retired, this occurred (Rtr. 4108):

> "I just received a note, dated 1/15/81, 13:30 hours, from the jury, that reads as follows:
>
> *"'The jury* in C 79-1591 RPA *requests review of your interpretation of ADEA.'*
>
> "I interpret that to mean that they want a reread of jury instructions.

"Accordingly, I am going to reread the following instructions, which—as given by me. I'm going to give them to you in the order in which they were given by me. And they're marked Defendant's 21, Plaintiffs' 34, Plaintiffs' 35, Defendant's 21, as amended, and that's it.

"Do you wish me to repeat them.?

"Ms. De Oddone: No, Your Honor, I have it.

"The Court: Mr. Connors?

"I'm sorry. I thought you had them in front of you.

"Mr. Connors: No. I think I know what they are.

"The Court: They're the Age Discrimination In Employment Act of '67, order and burden of proof under ADEA, demotion in violation of ADEA, Age Discrimination in Employment Act of 1967."

Then (*id.* at 4109-4110) the district court *reread* to the jury the very instructions this Court has held "completely failed to give any guidance as to the meaning 'determining factor' in lawsuits under the ADEA." And, the opinion holds, "This was error" (Op., p. 3).

If the district court, amply warned by the jury's note, had submitted verdicts to the jury on ADEA and the implied covenant claims separately, then it would be possible for the reviewing Court to believe that the jury *might* have applied the ADEA standard of *Kelly*, even though not instructed upon it, and not the looser California liability standard for implied covenant claims. The opinion teaches plainly that jury resort to the California implied covenant standard in deciding the federal ADEA case would be a misstatement and misshaping of *federal* law,[7] and that is what happened here.

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7. We ask the Court to recall that experienced lead trial counsel for Magnin warned on the record (R.Tr. 3960) that "the omission of 22, 23, 24, 24a, 24b and 26 take away the heart of the defense. That is to say that the discharge, the 'but for' factor, is not contained in any of the instructions Your Honor proposes to give."

In like manner, plaintiffs' lead trial counsel (R. Tr. 3961-3963) forcefully warned the district court that adequate instructions on determining factor "must be given."

The conclusion is rational, probable and comfortable that the trial jury, whose dismay or confusion over the correct ADEA determining factor standard was meticulously expressed to the court below on the record, simply applied—because no other guidance was given—the different standard for breach of the implied covenant to hold Magnin liable in damages for age discrimination under the ADEA, in the language of the covenant instructions, "for failure to act in good faith and to deal fairly" with plaintiffs. Lacking any explanation at all of the meaning of the standard for liability on the federal age claim—a state of affairs emphatically declared by both the opinion of this Court and the jury's note to the district judge—the jury's verdict in this case, we submit, could not have been founded on any standard other than the state law instruction that liability might be imposed if the jury regarded plaintiffs' terminations as unfair.

That prejudiced Magnin's substantial rights[8] and such is the standard for reversible error, as we now show.

THE STANDARD FOR TESTING FOR REVERSIBLE OR HARMLESS ERROR IN JURY INSTRUCTIONS: ERROR IN INSTRUCTIONS ON SUBSTANCE IS PRESUMED PREJUDICIAL

The opinion cites as sole authority for the holding that the ADEA instructions were only harmless error, F.R. Civ. P., Rule 61; *Ginsburg v. Ginsburg*, 276 F.2d 94 (9 Cir. 1960); and *Moore's Federal Practice*, and for its separately

8. One such right is found in the award here of nearly half a million dollars in attorneys' fees against Magnin. The right to fees exists only under ADEA. The award of fees in this case is tantamount to recovery of attorneys' fees under California law which provides no such right.

discussed and reasoned holding that issues over jury verdict forms are committed to the discretion of the district judge, Rule 49(b); *Monsma v. Central Mutual Insurance Company*, 392 F.2d 49 (9 Cir. 1968); and Moore.[9] Moore pointedly includes in the cited discussion, as a *caveat* (5A Moore's *Federal Practice* para. 49.04, p. 49-38, 2d.ed. 1981):

> "When a general verdict is to be returned, the charge of the court must necessarily be more comprehensive than that where only a special verdict is returned."

The cited decision of this Court in *Ginsburg* illustrates the standard for determining whether error is harmless or prejudicial in a much different kind of case. The defendant filed a notice of appeal from an order denying his motion for a new trial and to set aside the judgment, but no appeal from the judgment itself was taken. This Court applied 28 U.S.C. Sec. 2111 ("the court shall give judgment *** without regard to errors or defects which do not affect the substantial rights of the parties") in holding that the defendant would be deemed to have filed a notice of appeal from the judgment. The citation to Moore provides, in addition to the *caveat*, a general discussion of Section 2111, and parallel language in Rule 61, as applied to "niceties of form."

Determination of the harmless or reversible nature of error in jury instructions on substance, however, is a different matter, as decisions of this Court and the Supreme Court not cited in the opinion show. Nothing in Rule 61, Section 2111 (formerly Judicial Code Sec. 269, 28 U.S.C.

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9. And for the proposition that neither judge nor jury trying the facts is required to itemize damages, a point we think wide of the mark, *Neal v. Saga Shipping Co.*, 407 F.2d 481, 489 (5th Cir.), *cert. denied*, 395 U.S. 986 (1969), *cited in Frito-Lay, Inc. v. Local 137, International Brotherhood of Teamsters*, 623 F.2d 1354, 1365 (9th Cir. 1980), *cert. denied*, 449 U.S. 1013 (1981), *and cert. denied*, 448 U.S. 1112 (1981).

Sec. 391) or case authority calls upon a reviewing court to determine what a jury in a new trial might do.[10] The inquiry is what the jury which decided the case on appeal could be said to have done or not done.

The Advisory Committee Notes on Rule 61, after first confirming its lineage from Section 2111 (formerly Sec. 391) and also from Section 777, direct the reader to the decision in *McCandless v. United States,* 298 U.S. 342 (1936), where the Court held rejection of certain evidence to require reversal. The Court said (298 U.S. at 347-348):

> "In this situation Section 269 is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial. *United States v. River Rouge Co.,* 269 U.S. 411, 421; *Fillippon v. Albion Vein Slate Co.,* 250 U.S. 76, 82; *Williams v. Great Southern Lumber Co.,* 277 U.S. 19, 26" (Underscoring in original.)

Accord: United States v. River Rouge Co., 269 U.S. 411 (1926); *Kotteakos v. United States,* 328 U.S. 750 (1946);[11]

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10. See Traynor, *The Riddle of Harmless Error* (Ohio Univ. Press 1970), p. 27.

11. 328 U.S. at 765:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phrase affected by the error. It is rather, even so, whether the error itself had substantial influence."

and, especially, *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919).[12]

Just as the decisions of the Supreme Court distinguish carefully between technical, formal matters and matters of substance in deciding whether an error at trial was prejudicial or harmless, so do decisions of this Court not cited in the opinion. We have already cited *Gordon Mailloux Ent. v. Fireman's Ins. Co. of Newark, N.J., supra,* on the coagulation of one or more harmless errors into error which is prejudicial overall. Even more closely in point are the decisions of this Court in *Almaraz v. Universal Marine Corp.*, 472 F.2d 123 (9 Cir. 1973), *Northern Pacific Railway v. Herman,* 478 F.2d 1167 (9 Cir. 1971), and *Pollock v. Koehring Co.*, 540 F.2d 425 (9 Cir. 1976). *Almaraz,* a longshoreman's action for injuries received in unloading cargo, holds (472 F.2d at 124):

"The defendant objected to this charge (i.e., on contributory negligence), arguing that the instruction

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12. 250 U.S. at 81-82:

"The Circuit Court of Appeals considered that the jury had asked a plain question in writing concerning a matter of law, and the judge had answered it in writing plainly and accurately, and were of the opinion that since nothing else had occurred—the question and answer having been preserved of record and counsel having been promptly notified of what had taken place and given the opportunity of excepting to the substance of the instruction and to the manner of giving it—no harm had been done, and none was probable to arise under like circumstances, and hence affirmed the judgment.****

"**** And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless.

"In this case, so far from the supplementary instruction being harmless, in our opinion it was erroneous and calculated to mislead the jury *in that it excluded a material element that needed to be considered in determining whether plaintiff should be held guilty of contributory negligence under the particular hypothesis referred to in the jury's question.*"

failed to provide a standard against which the jury could measure Almaraz's behavior. We agree.

"Although the trial judge informed the jury that Almaraz should have exercised ordinary care, he did not state that the standard of conduct required to avoid negligence was that of a reasonably prudent person under similar circumstances. This failure allowed the jury to employ any standard it might choose: a friend, a juror or even Almaraz as the standard. We hold that this omission constituted reversible error."

In *Northern Pacific Railway*, the Court applied the test of *Fillippon v. Albion Vein Slate Co., supra*, for harmless or prejudicial error in jury instructions and held (478 F.2d at 1171):

"After reading the entire instruction it appears to this court that the instruction was confusing and left the jury with the mistaken impression that estoppel was a complete defense to both of plaintiff's causes of action, and it was not. The instruction is prejudicial because it is confusing and inconsistent on a material issue and could possibly mislead the jury.

"Error in a specific instruction is not cured by general statements which set out the respective contentions. *See United States v. Natt McDougall Co.*, 381 F.2d 686 (9th Cir. 1967). But even in the general instructions the trial court did not make it clear that either of plaintiff's theories would support recovery.

"Erroneous instructions in a jury trial are presumptively injurious and are grounds for reversal unless it affirmatively appears on the record that the error was harmless. *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 39 S.Ct. 435, 63 L.Ed. 853 (1919). As this Court said in *Pacific Greyhound Lines v. Zane*, 160 F.2d 731 (9th Cir. 1947):

" 'Nothing in the record enables us to ascertain upon which theory of fraud the jury may have

rested its general verdict. The presence of these conflicting instructions provides no assurance that the error did not materially affect the jury's verdict. *Id.* at 737.'

"Since there is nothing in this record which affirmatively shows upon what theory the jury based its general verdict for defendant, the case must be reversed and remanded."

And in *Pollock*, where the Panel included Judge East, the Court held (540 F.2d at 426-427):

"The only question before us is whether this error requires reversal. Both parties to this appeal have cited California law on the issue. If it applied, *Henderson* would dictate reversal. Although we look to state law for the correct substance of jury instructions, the question whether an incorrect instruction is prejudicially erroneous is a procedural one requiring application of federal law. *Lones v. Detroit, Toledo and Ironton Ry. Co.*, 398 F.2d 914, 920 (6th Cir. 1968), *cert. denied*, 393 U.S. 1063, 89 S.Ct. 714, 21 L.Ed.2d 705 (1969); *accord, Seltzer v. Chesley*, 512 F.2d 1030, 1035 (9th Cir. 1975); *see* Rule 51, Fed.R.Civ.P.

"Our inquiry is, therefore, whether, looking to the instructions as a whole, the substance of the applicable law was fairly and correctly covered. *Bolden v. Kansas City Southern Ry. Co.*, 468 F.2d 580 (5th Cir. 1972). In making this inquiry, we note that both inconsistent or equivocal instructions and incorrect statements of the law may be prejudicially erroneous. *Bollenbach v. United States*, 326 U.S. 607, 612, 66 S.Ct. 402, 90 L.Ed. 350 (1946); *United States v. Neilson*, 471 F.2d 905, 908 (9th Cir. 1973); *Bolden v. Kansas City Southern Ry. Co., supra*, 468 F.2d 580; *Ratay v. Lincoln National Life Ins. Co.*, 378 F.2d 209 (3d Cir.), *cert. denied*, 389 U.S. 973, 88 S.Ct. 472, 19 L.Ed.2d 465 (1967). We also note that the portions of the instructions read shortly

before the jury retires are critical. *Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359, 362 (2d Cir. 1966).

"We hold, consistent with the state court in *Henderson*, that the instructions in this case require reversal. Taken as a whole, they were both erroneous and inconsistent."[13]

CONCLUSION

The opinion filed March 30, 1982, holds emphatically that the trial of this case, surely to be viewed in later years as a landmark in age discrimination litigation burgeoning today as Title VII cases did ten years ago, was affected with errors so profound as to move the Panel to state explicitly in its opinion how the errors it found are to be avoided by the District Courts in future ADEA jury trials. We respectfully submit that in its analysis of the errors below as separate things and its conclusion that the errors viewed separately were harmless, the Panel either overlooked decisions of the Supreme Court and this Court on the application of Rule 61 and Section 2111 to error in jury instructions on liability compounded and amplified by submission of a general verdict,[14] or that the Panel decided not to follow this body of law for reasons not stated in its opinion.

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13. See Traynor, *op. cit. supra*, p. 74:
"If an instruction relates to a substantial element of the appellant's case, an appellate court would not find it highly probable that the error did not influence the verdict."

14. A possibility which the authors of *Moore's Federal Practice* explicitly recognize in the passage cited by the Panel in its discussion of the form of verdict here, *supra*, p. 10.

The errors found by the Court in its opinion of March 30, 1982, were prejudicial, not harmless, and I. Magnin is entitled to reversal of the judgment appealed from and to an order remanding for a new trial.

Respectfully submitted,

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Appendix D-1

Excerpts From Plaintiffs' Complaint

I

NATURE OF THE CASE

This is an action brought by three retailing executives, PHILIP D. CANCELLIER, JOHN W. COSTELLO, and ZELMA SMITH RITTER, against their former employer, FEDERATED DEPARTMENT STORES, INC., doing business as I. MAGNIN, alleging that they were unlawfully terminated as a result of their former employer's policies and practices of discrimination on the basis of age. In addition, each plaintiff alleges claims for damages for breach of the employment agreement between defendant and himself/herself. Plaintiff COSTELLO also alleges a claim for damages for deceit.

• • •

VI

FIRST CLAIM FOR RELIEF

A. *Plaintiff PHILIP D. CANCELLIER.*

Plaintiff CANCELLIER was hired as department manager with regional responsibilities by I. Magnin in April, 1953. After a seven month break in service between November, 1959, and June 9, 1960, plaintiff CANCELLIER returned to I. MAGNIN as a fine shoe buyer and was subsequently promoted Vice-President of the Southern Region in 1968, and then to increasingly more responsible positions within I. Magnin culminating with his appointment in 1975 as Vice-President Stores/Operations covering 23 retail stores, which was the position he held at the time of his termination.

On May 1, 1978, after a total of 25 years of wholly satisfactory, competent, and diligent performance to his em-

ployer's profit, plaintiff CANCELLIER was terminated by defendant on the basis of his age.

VII

In terminating plaintiff CANCELLIER, defendant willfully, knowingly, and intentionally discriminated against him on the basis of his age.

• • •

IX

B. *Plaintiff JOHN COSTELLO.*

Plaintiff COSTELLO was hired as a special executive trainee by I. Magnin on July 10, 1961, and was subsequently promoted to increasingly more responsible positions within I. Magnin, culminating with his appointment in 1975 as Divisional Merchandise Manager-Accessories responsible for 23 retail stores, which was the position he held at time of his termination.

On May 1, 1978, after approximately 17 years of wholly satisfactory, competent, and diligent performance to his employer's profit, plaintiff COSTELLO was terminated by defendant on the basis of his age.

In terminating plaintiff, defendant willfully, knowingly and intentionally discriminated against him on the basis of his age.

• • •

XI

C. *Plaintiff ZELMA SMITH RITTER.*

Plaintiff RITTER was hired as a salesperson by I. Magnin in August, 1959, and soon thereafter was promoted to Assistant Buyer, then Buyer on February 1, 1961, and was subsequently promoted to increasingly more responsible buying positions, culminating with the position of Buyer-

Sports Apparel for 23 retail stores, which was the position she held at the time of her termination.

On January 6, 1978, after 18 years of wholly satisfactory, competent, and diligent performance to her employer's profit, plaintiff RITTER was terminated by defendant on the basis of her age.

In terminating plaintiff RITTER, defendant willfully, knowingly and intentionally discriminated against her on the basis of her age.

• • •

XIII

The acts, policies and practices of defendant alleged herein violate Section 4 of the ADEA, 29 U.S.C. § 623, and Section 15 of the FLSA, 29 U.S.C. § 215.

• • •

XVIII

SECOND CLAIM FOR RELIEF

The allegations of Paragraphs I through V and the allegations of Paragraphs VI through XVII of the First Claim for Relief are realleged and incorporated herein by reference as though fully set forth.

• • •

XX

In 1977, in the City and County of San Francisco, California, each plaintiff and the defendant entered into an employment agreement contained in several writings, including, but not limited to, the Personnel Policies and Procedures Manual, the Retirement Income and Thrift Incentive Plan, the Executives Deferred Compensation Plan, the Employee Stock Ownership Plan, the employee handbook, and the Supplementary Retirement Plan for executives.

Defendant's Personnel Policies and Procedures Manual states at Index No. 40-10-3:

• • •

B. Age:

1. It is the policy of I. Magnin to conform to State and Federal laws regarding age discrimination."

• • •

XXI

Taken together, this total employment agreement constitutes an express agreement on the part of defendant not to terminate the employment of any of the plaintiffs for so long as his/her job performance was satisfactory or not detrimental to the interests of the Company and, in any case, not to terminate any of the plaintiffs on the basis of age. Each plaintiff understood said total employment agreement to have this effect.

• • •

XXV

THIRD CLAIM FOR RELIEF

The allegations of Paragraph I through V, the allegations of Paragraph VI through XVII of the First Claim for Relief, and the allegations of Paragraph XVIII through XXIV of the Second Claim for Relief are realleged and incorporated herein by reference as though fully set forth.

• • •

XXVII

Beginning in approximately January, 1978, and culminating with his termination on or about May 1, 1978, defendant breached its implied covenant of good faith and fair dealing with regard to plaintiff CANCELLIER by terminating his position and transferring the work to younger employees, attempting to camouflage this breach by making

a sham offer in bad faith of alternative employment, and by terminating him without regard to or compliance with the requirements of the employment agreement, all with the object of replacing plaintiff CANCELLIER with younger personnel, reducing salary costs, and avoiding its obligation to pay plaintiff CANCELLIER benefits under the Supplementary Retirement Plan for executive employees.

XXVIII

Beginning in approximately May of 1977 and continuing until his termination by defendant on or about May 1, 1978, defendant breached its implied covenant of good faith and fair dealing with respect to plaintiff COSTELLO by promising, without intent to perform, that if there was any change in his job assignment, he would be given another assignment at the same divisional level without loss of salary, by terminating him without offering him another assignment although openings existed for which he was qualified, by failing to appraise plaintiff COSTELLO for his 1977 work in accordance with the appraisal procedure for divisional merchandise managers and buyers carried out in March and April of 1978, and by terminating plaintiff COSTELLO without regard to or compliance with the requirements of the employment agreement, all with the object of replacing plaintiff COSTELLO with younger personnel, reducing salary costs, and avoiding its obligation to pay benefits to plaintiff COSTELLO under the Supplementary Retirement Plan for executives.

XXIX

Commencing in approximately April, 1977, and continuing until her termination on or about January 6, 1978, defendant breached its covenant of good faith and fair

dealing with respect to plaintiff RITTER by harassing her and making false statements about her performance through her supervisor, by giving her until January 31, 1978, to improve but terminating her prior to that date, and by terminating her without complying with the requirements of the employment agreement, all with the object of preventing her from performing her duties and of forcing her to quit her employment in order to replace her with younger personnel, to reduce salary costs, and to avoid its obligation to pay benefits to plaintiff RITTER under the Supplementary Retirement Plan for executive employees. When plaintiff RITTER refused to quit her employment, defendant discharged her in breach of its implied covenant of good faith and fair dealing.

Appendix D-2

Excerpts From Plaintiffs' Pretrial Statement

c. *Substance Of The Action*

Cancellier, Costello and Ritter had lengths of service with I. Magnin ranging from approximately 25 years to 17 years at the time each was discharged in early, 1978. At the time of termination, each was an executive employee at Defendant's San Francisco location; each was over 50 years of age and each was satisfactorily performing his or her job responsibilities. All Plaintiffs, because of both their substantial years of service with the Company and their ages, were potentially eligible to receive extensive retirement benefits under the Defendant's supplementary retirement plan. Each Plaintiff was subject to executive personnel policies and appraisal procedures which required that they be terminated only if their performance was unsatisfactory and only if they had received a warning and ample opportunity to improve. The policies further preclude the taking of any employment action on the basis of age.

The Complaint raises three basic claims. First, all Plaintiffs contend that they were discriminated against on the basis of their ages and in furtherance of Defendant's goal to staff executive positions with younger individuals deemed promotable by the Company and costing the Defendant substantially less in salary and potential retirement benefits. All Plaintiffs claim that their discharges were also taken in furtherance of Defendant's goal to attract a youth market through staffing with younger personnel.

Cancellier, Costello and Ritter contend that they were terminated without regard to the personnel policies and appraisal procedures promulgated by Defendant to induce employees to remain with the Company. This claim is predicated upon the California legal doctrine that such

personnel policies create enforceable contractual obligations as well as give rise to an implied covenant of good faith and fair dealing.

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d. *Undisputed Facts*

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9. Defendant had certain personnel and appraisal procedures applicable to executive employees in effect at the time that each Plaintiff's employment was terminated. Those policies established procedures governing the manner in which employment could be terminated, required that involuntary terminations occur only for unsatisfactory work performance or other cause and mandated that all employment determinations be made without regard to an employee's age.

• • •

e. *Disputed Factual Issues*

1. Was Cancellier's age a determining factor in his discharge.

Defendant has posed as a disputed fact whether or not Cancellier was discharged, either constructively or directly, or whether he quit his employment after being told that his job was no longer available to him and after being offered two alternate job positions which were concededly demotions. Plaintiffs, however, do not believe that the fact of Cancellier's discharge can reasonably be viewed as a disputed one in light of admissions contained in Defendant's documents proving that Cancellier's termination was involuntary.

2. Was Costello's age a determining factor in his discharge.

3. Was Ritter's age a determining factor in her discharge.

4. Was Defendant's claimed reorganization of the Vice-President of Stores positions utilized as a pretext for terminating Cancellier due to his age.

5. Are the reasons now given by Defendant for its position that there were problems in the work performance of each of the Plaintiffs pretext for its determinations to terminate each Plaintiff due to his or her age.

6. Did Defendant have a policy of age discrimination and/or did Defendant practice a pattern of age discrimination.

7. Did Defendant violate its personnel policies and procedures and its appraisal procedures in terminating Cancellier even though his job performance was adequate and in the absence of any warning or opportunity to improve his work performance.

8. Did Defendant violate its personnel policies and procedures as well as its appraisal procedures in terminating Costello even though his job performance was adequate and in the absence of any warning or opportunity to improve his work performance.

9. Did Defendant violate its personnel policies and procedures as well as its appraisal procedures in terminating Ritter even though her job performance was adequate and without according the required warning or opportunity to improve her work performance.

10. Did Defendant violate its personnel policies in taking adverse employment action against each of the Plaintiffs on the basis of their ages.

Appendix D-3

Excerpts From Plaintiffs' Argument to the Jury

(R.T. 3967:2-3989:6; 4026:6-4028:17)

Ms. McClain: Ladies and gentlement of the jury, several weeks ago, you will recall that we started out talking about a framework that you would have in front of you as we reviewed the evidence in the case.

I'd like you to think back now with me to that framework that the plaintiff have shown by strong, convincing evidence of that framework on each of the claims the plaintiffs have presented to you.

I think you will see, as we go through the framework, that we discussed a long time ago, and piece with me the evidence, that they were wronged in precisely the manner in which they alleged they had been wronged.

You have one advantage the plaintiffs did not have when they commenced this lawsuit, and when they were in those painful, confusing days following their terminations after 25 years of employment, after 18 years of employment, after 17 years of employment: you have seen documents the plaintiffs did not know existed at the time of their termination. Those documents, in the defendant's own hand, prove, more loudly and more clearly than reams of testimony, what actually occurred in this case.

Let's look at each of those claims with particular concentration on those documents in the defendant's own hands.

Let's turn to the age claim first:

As you have heard, as we've progressed through this case, there is a Federal law prohibiting age discrimination. It prohibits the adverse employment action against an individual within the protected category because of that individual's age. Each of the plaintiffs before you are within the age categories protected by the Act.

Now, the Act is not limited to specific employment actions, such as discharge. It prohibits adversely affecting an employment of an individual because of that individual's age. You will hear during the instructions that such adverse action can include demotion.

• • •

The plaintiffs bear the burden, ladies and gentlemen, of showing you that it is more likely than not that their age was a cause of their discharge.

Let's look at the defendant's own documents when posing that inquiry: was age a cause of the defendant's—of the plaintiffs' discharge.

Let's start with plaintiff's Exhibit 1, and I think, as we follow through the documents that have been presented to you, we will see that there was a decade, at least, of age discrimination at Federated Department Stores, with particular applicability to I. Magnin.

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There's one other concept that was explored in plaintiff's Exhibit 1, and I think continued throughout the decade. And that is this concept of promotability.

Once the defendant finds that an executive is old and non-promotable, regardless of how well that executive is doing, then, I submit the evidence shows that that executive is on his or her way out to make room for a younger, promotable individual, because that executive costs Federated Department Stores too much money, because that executive is just of little use, regardless of the years of service, regardless of how well that executive is doing.

• • •

Ladies and gentlemen, each of the plaintiffs in this action was stamped, was classified with his or her age. And that stamping, coupled with the determination that they were

no longer of use to the company, because they were not promotable, resulted in events leading inalterably to their discharges.

• • •

Mr. Cancellier was stamped in the beginning of 1977, when he was determined not to be promotable to a principal level. And, from that stamping, everything else followed.

Mr. Costello was stamped when he was determined to be good but career and not promotable beyond this level.

You will recall that, while Mr. Costello's supervisors said, "The jury is still out. I haven't determined how he's really performing in that job," in 1976, a search was already underway for Mr. Costello's replacement.

Job performance one way or the other was not important, ladies and gentlemen. What was important was that non-promotability.

Mrs. Ritter, too. "Never a DMM."

You recall those fateful words, written by Mr. Hughes, although you will also recall that he did not, to his current recollection, discuss "Never." He discussed every other matter in that note, except the "Never."

In any event, Mrs. Ritter was determined to be non-promotable, and, thereafter, her career took a decided turn for the worse.

Each of those plaintiffs were considered in conjunction with their age.

• • •

Let's talk about another side of an age claim, and that is a word called "pretext," ladies and gentlemen.

The Defendant can come forward, and will come forward, undoubtedly, and argue to you that there were reasons for what happened to each of these Plaintiffs.

You can look at those reasons, and it's within your province to say, they are so inconsistent as to be unbe-

lievable. They are incredible. Or they mask the Defendant's real motives. They aren't really what was going on.

Let's look at some of those reasons that were presented during the course of testimony from Mr. Cancellier, Mrs. Ritter, and Mr. Costello. And I think we will see that any consistency, nonsensicalness, run rampant throughout those reasons.

Let's start with Mr. Cancellier.

The inconsistencies regarding what happened to Mr. Cancellier among the chief decision makers at I. Magnin and Federated and stunning.

Mr. Hughes told you in lengthy testimony over and over again that the Company had no intention of terminating Mr. Cancellier in late 1977; they were just busily finding a place for him in the Company.

Mr. Anderson told you that, well, Federated did indeed write him a note saying Mr. Cancellier will be terminated on or about February 1. Terminated didn't mean fired. It meant terminated from that position.

The first example, ladies and gentlemen, of a series of incredible meanings applied to words by the defendants.

Mr. Wechsler told you in the last day of testimony that Mr. Anderson was indeed contemplating terminating Mr. Cancellier in 1977. Wouldn't you think if they had a real reason for doing something to Mr. Cancellier that they would have their stories straight on that issue?

Mr. Hughes said that Mr. Cancellier had an option of remaining in his current staff position. Mr. Anderson said that that option wasn't presented to him.

Ladies and gentlemen, what happened with respect to Mr. Cancellier is precisely what the documents say happened. And the proof of what happened to Mr. Cancellier is Mr. Hughes' note, "Position P.C. out in six months," written in September of 1977 following that determination

that Mr. Cancellier was non-promotable to a principal position. And anything that happened after that note, "Position P.C. out in six months," was pretext. It was set up. It was a mask to get rid of Mr. Cancellier in as painless a way as possible to the Company.

They may have been looking for a single head of stores on and off. Undoubtedly they were, but what happened in September of 1977 is that they saw a way to use that single head of stores search to ease Mr. Cancellier out of the Company. When they offered those two conceded demotions to Mr. Cancellier in 1978, Mr. Anderson told you that they were possibilities; that they were couched in vague terms.

Ladies and gentlemen, Mr. Hughes and Mr. Anderson did everything possible to convince Mr. Cancellier that those jobs weren't really there because they wanted him out. That is the meaning of "Position P.C. out in six months."

The pretext, ladies and gentlemen, continued to the trial of this matter. How many days were taken in telling you that Mr. Cancellier really quit, after all. He really meant to leave. It was a voluntary action.

Do you recall Mr. Taylor getting on the stand just days before this trial closed and telling you with a straight face that notwithstanding the fact that every single personnel document referred to the action severing Mr. Cancellier's employment as a termination, Mr. Cancellier quit. Ladies and gentlemen, that is a classic example of pretext.

What really happened is that Mr. Cancellier left. Mr. Neloms assumed his responsibilities, or to use Mr. Anderson's term, "substantially his responsibilities." And Mr. Chesler continued to do the same old thing. They may not have had ultimate responsibility. They may not have had a line going up to them on that organizational chart, but day to day those job functions continued to be performed because no single head of stores ever came upon the scene.

Look at their reasons give to you, ladies and gentlemen, for an adverse action affecting Mr. Cancellier's job with the Company after twenty-five years.

Mr. Wechsler told you that the biggest complainer about Mr. Cancellier was Mr. Wittick. Mr. Wittick told you that he had one five-minute conversation with Mr. Anderson and Mr. Hughes at Mr. Hughes' insistence during which he was asked whether there were any problems with Mr. Cancellier. What the defendant has presented to you as the reasons for getting rid of this employee after twenty-five years of employment is office gossip, ladies and gentlemen, and nothing more.

Let's turn to Mr. Costello. The inconsistencies and the pretext is just as clear in Mr. Costello's case. The defendant never did get it straight whether it was the numbers or some people problems that Mr. Costello was experiencing.

In 1977 Mr. Fox told you that Mr. Costello had some erratic behavior, but in the early part of the year his statistics were good. If you look at that review in the defendant's own handwriting, in their own personnel appraisal system, you will find that Mr. Costello received good grades for people relations and that his overall review was average to above average. Ladies and gentlemen, that is hardly the picture of someone who is in trouble. And it is hardly the picture of telling something that they are in trouble; average to above average.

What happened is that after that determination of nonpromotability, it didn't matter what Mr. Costello did. It didn't matter that his division was number one in the company in gross merchandise margin percent. It didn't matter that his sales and profits had consistently increased from the beginning of his taking over that divisional. It didn't matter that in the last year of his tenure as a divisional merchandise manager he was better than seven other divisions in sales growth.

What does the defendant tell you about all those figures? The defendant tells you that somehow they just weren't good enough. Ladies and gentlemen, those figures and the job evaluation done in April of 1977 of average to above average tell you in documents, in objective evidence, that Mr. Costello was indeed doing a very good job.

Let's take Mrs. Ritter. The pretext is glaring in Mrs. Ritter's case.

You heard witness after witness of the defendant tell you that people at I. Magnin swore. It is a tough business. Ladies and gentlemen.

In December of 1976, after probably swearing for seventeen years, Mrs. Ritter was summoned in to Mr. Benham and Mr. Hughes' presence, given a sheaf of papers involving two instances, the Amanda Burton incident and some other incident, and told that she had better start getting along with Mr. Benham. The defendant tells you that that was a warning meeting. Mrs. Ritter told you that it was a discussion to see how things could be resolved.

Let's take the defendant's view for a moment, that of a warning meeting.

Let's assume that Mrs. Ritter was given a warning on profanity in December of 1976. Ladies and gentlemen, that warning fulfilled its purpose. Mr. Benham told you in his testimony that no further instances occurred. You warn somebody; they do what you tell them to do and then what happens? You have to find another reason for your plan to get rid of the individual.

There is one other instance of profanity that has been presented to you after the December 1976 flurry of documentation, and that is Mrs. Dirks. Do you recall Mrs. Dirks?

Mrs. Dirks couldn't remember in her deposition whether or not swearing even occurred. All she remembered was there was some kind of a scene in Phoenix. She couldn't

even remember when it occurred. Her recollection was miraculously refreshed on the stand and she said upon reflecting she thought perhaps the word "shit" had been used.

Ladies and gentlemen, Mrs. Dirks didn't recall what the underlying incident was, and nobody else recalled much about what happened. If you look at the testimony of defendant's witnesses, you will find it is riddled with inconsistency about that Dirks instance.

Mrs. Dirks said that she talked to Mr. Somers, Mr. Anderson and Mr. Chesler about this terrible thing that had befallen her. Mr. Anderson said he never talked to Mrs. Dirks. Mr. Hughes talked to Mrs. Dirks. Mr. Wechsler said he did talk to Mrs. Dirks. Mr. Somers in his deposition said he didn't talk to Mrs. Dirks, but on the stand testifying before you he said he did talk to Mrs. Dirks.

Now, the reason for those inconsistencies is because nothing of importance happened in Phoenix in 1977. Nobody could remember what occurred. But it was something that could be used in the final analysis to get rid of a buyer who had been there for eighteen long dedicated years of employment.

What happened when Mrs. Ritter cleaned up the profanity when she went along with the warning that Mr. Benham gave her in 1976?

Mr. Benham was directed by Mr. Hughes to get objective performance documents. Do you recall Mr. Benham's objective performance documents? Do you recall the review he performed in March of 1977 where notwithstanding the fact that 20 out of 23 categories were average or above average, the overall summary was checked between average and below average.

Do you recall his testimony that the Sherman business that Mrs. Ritter was developing in 1977 shouldn't be counted in her figures? "Just leave that out, because she didn't have

that in 1975. Never mind that. A bunch of other things were taken away and no longer her responsibility then. Let's take out the Sherman figures anyway."

If you put the Sherman figures back in and you find that during that last review preceding Mrs. Ritter's termination she did better than her division in gross merchandise margin percent, in sales growth, and in profit growth.

Where did Mr. Benham get lagging behind the division? You heard Mr. Foo, defendant's own witness—one of defendant's own witnesses say that, indeed, if you looked at the figures and you compared what actually happened with what actually happened, it would appear the division was lagging behind Mrs. Ritter. What happened at the end of 1977 to Mrs. Ritter? Another flurry of activity about order writing, some comments about mail order catalogs, when you have seen, ladies and gentlemen, over and over again that Mrs. Ritter had the best performance in each of those mail order catalogs.

And then there was something about Kimberly. Do you recall that? Kimberly people were complaining in new York. There were difficulties with Kimberly orders.

Kimberly went out of business, ladies and gentlemen, in 1978. There probably was difficulty with Kimberly's orders.

And then there was a Stanley Sherman complaint, some discussions with Mr. Sherman.

This is a volatile business, ladies and gentlemen. Mr. Sherman didn't tell you what happened. You got the defendant's interpretation of what happened.

In any event, it is a volatile business where people talk, where people gossip, and that is what you got from Mrs. Ritter's termination as well. Gossip.

Let's turn to the second claim presented by each of the plaintiffs in this matter, and that is a claim that their contractual relationship with I. Magnin has been breached in their discharges.

Ladies and gentlemen, each of these plaintiffs had a long standing employment relationship with I. Magnin. They were employed for years and years and years with good evaluations on I. Magnin's own personnel policies.

You heard Mr. Hughes talk about the performance appraisal system and about the termination policies. You heard what he said about the reasons for those documents being in effect. They are distributed to employees, ladies and gentlemen, because they are a benefit to both the company and the employee. The company gets an employee who remains, who builds up experience over the years, and the employee gets a sense of security, a sense of knowing that he or she will not be terminated unless he or she receives fair warning; unless he or she receives a fair evaluation of work performance; unless he or she is given an opportunity to improve.

With respect to each of these plaintiffs, ladies and gentlemen, the defendant made a mockery out of its performance appraisals and its policies and procedures which it intended the employees to rely upon. Each one of them was evaluated as being a good employee. Each one of them did not know that there was anything affecting his or her employment status, because the boxes checked on that performance appraisal told them that they were doing a good to better than good job.

There is a third claim that each of the plaintiffs raise in this action, and that is a claim of an implied covenant of good faith and fair dealing.

Because of their long-standing relationship, ladies and gentlemen, and because the defendant recognized obligations to these employees in the forms of those personnel policies, it had an obligation to deal fairly with them, to treat them honestly and above board and with direct approach.

We don't need to go over the pretext again to detail those facts. But it is clear, ladies and gentlemen, is it not, that each of these plaintiffs was dealt with in a malicious, in an unfeeling, in a manner that didn't recognize their service to the company.

• • •

Ms. Mc Clain: Ladies and gentlemen, there have been exactly some five weeks of trial. Have you yet to hear an explanation for the constant reference to age throughout the defendant's documents? Have you yet to hear a consistent explanation as to why the plaintiffs were terminated, other than the defendant thought it was a good idea, and it's within the defendant's business judgment to make those kind of conclusions?

Defendant has told you there is a straw upon which plaintiffs rest their case of age discrimination, and that straw is plaintiff's Exhibit 1.

Ladies and gentlemen, plaintiff's Exhibit 1 is the start of document after document after document commenting upon age in the context of personnel decisions. Not a fact of life, ladies and gentlemen, that needs to be looked at.

It was a fact of life at I. Magnin that, in every area of employment determinations, age was considered.

• • •

Ladies and gentlemen, every key executive at I. Magnin was classified by his or her age, and that chart was used in personnel decision-making.

Age was indeed a fact of life at I. Magnin. It was the basis for employment determinations.

Pick up plaintiff's Exhibit 11 and leaf through letters from business careers. You will find, time and time again, the youth of employees is referred to.

Look at Mr. Anderson's speech. Look at what happened

over those years and ask yourself whether age was a factor that was ignored by I. Magnin, or whether indeed—

Mr. Connors: If your honor please, I did not refer to business careers. I thought this was rebuttal and not new argument.

The Court: Well, it is rebuttal, but I think it's within the scope of rebuttal, Mr. Connors. I will allow it.

Mr. Connors: All right.

Ms. Mc Clain: —or whether indeed age was the overall consideration for employment determinations. • • •

Appendix E-1

Statement of Facts in Plaintiffs' Opening Brief (Pages 3-23)

B. Statement Of Facts Relevant To The Issues Presented For Review

Two facets of the trial record demonstrate Plaintiffs' entitlement to injunctive relief and reinstatement: Federated's age discrimination policy and the employment histories of Cancellier, Costello and Ritter. Each facet will be examined in this section of the brief, an examination which will demonstrate that the Plaintiffs will not be made whole and the purposes of the ADEA will not be effectuated until these three individuals are returned to work at I. Magnin and the Company is told to cease its discriminatory policy and practices.

1. Federated's Policy Of Age Discrimination At I. Magnin

An examination of the 1970's demonstrates Defendant's consistent pronouncement and application of age discrimination in employment policies and decisions. Often, age discrimination was correlated with the I. Magnin goal to attract a "youth market" and its desire to lower the median age of executive employees through the replacement of older, capable employees who were deemed to have reached their career positions with "bright," "young," "aggressive" individual.

Ross Anderson, I. Magnin Chief Executive Officer from 1972 through 1979, testified that the development of a youth market was a "consistent objective" for many years (RT, Trial Transcript, Vol. 20, pp. 3349, 3374, 3440-3441). Former I. Magnin Divisional Merchandise Manager Eric Steiner testified: "One of the main concerns we had as management was that we were not attracting young customers into the

store." (RT, Trial Transcript, Vol. 15, p. 2402). Because of that concern and at the request of upper I. Magnin management, Steiner prepared, in the Fall of 1969, a document analyzing staffing needs of certain departments selling goods bought by Ms. Ritter (*Id.*, pp. 2390-2391, 2402). That report contained such conclusions as:

> We need an influx of new, younger-thinking people who can merchandise and sell in tune with the 70's.
>
> Here, also, we need that 'ageless' salesperson of 30 to 45, who relates more effectively to both customer and merchandise.
>
> San Francisco particularly has too many superannuated salespeople. This could and should be a much younger department in both setting and selling.

(Plaintiffs' Trial Exhibit No. 46, pp. 10, 12 and 19).

In a five, and in part ten, year projection of I. Magnin's business and personnel needs prepared in 1970 and entitled "Organization and Key Manpower Plan (1970-1975)," Federated reiterated its merchandising goal to "project a more modern appeal to the youth market" (Plaintiffs' Trial Exhibit 1, p. 7820).

Once again, the age of I. Magnin employees was related to the goal of achieving appeal to a youth market. In a section of the report analyzing executive personnel, Federated compared in graph form the median age of I. Magnin key executives with that of other divisions and noted that the I. Magnin median age of 48 was "substantially higher than the Federated median". The report documented Federated's concern that with such age grouping I. Magnin could not accomplish its merchandising goals and suggested a solution to the problem. The corporate report reads:

> A more subtle question relates to the implications of this age distribution upon Magnin's goal to have increasing impact in the youth market. An aging study

> of the rest of Magnin's management might disclose *the need for the planned introduction of younger personnel*—particularly in the merchandising and sales areas.

(Plaintiffs' Trial Exhibit 1, pp. 7834-7835 [emphasis added]).

The 1970-1975 Organization and Key Manpower Plan presented other themes concerning executive personnel decisions which were to be reiterated by I. Magnin throughout the decade. The report, for example, phrased a concern that the retirement benefits might not be adequate for such a "relatively high age grouping," commented that I. Magnin had a small number of "promotable" key executives and expressed a need to identify "high potential talent" as back-up candidates for key executives (*Id.*, p. 7835). The Federated report contains other references to an individual's age, at times correlated with an assessment of the individual's future potential. About executive Loma Petersen, for example, it was written, "Because of age (59), she has, of course, reached her potential" (*Id.*, p. 7935).

Throughout the decade, Federated and I. Magnin managers emphasized age in hiring and recruitment. For ten years, Federated officials in charge of executive placement utilized a form entitled "Personnel Specification Sheet" for recording information about a vacant executive position. The form contained seven categories, admitted by Federated Vice-President J. L. Tonner to be the "most important aspects" of information needed to conduct an executive search. The categories were: position title, date required, salary range, responsibilities, to whom the position reported, background and "desirable age" (Plaintiffs'

Trial Exhibit 7; RT, Trial Transcript, Vol. 15, pp. 2430-2431).[4]

During the 1970's, both I. Magnin and other Federated divisions utilized a New York firm known as "Business Careers" for executive recruitment. Samples of correspondence between I. Magnin executives and Business Careers personnel were introduced at trial. The correspondence shows a consistent, repeated emphasis upon the youth, ambition and growth potential of candidates for hire (Plaintiffs' Trial Exhibit 11). Excerpts from the I. Magnin-Business Careers correspondence are:

> Russell is a bright, young man who is supposed to be one of the comers in the business.
>
> (Letter from Business Careers President Mines to the then Vice President of Personnel at I. Magnin, Charles Gray, dated June 13, 1974).
>
> This [Bruce Downard] is an exceptionally bright, personable, ambitious young man with tremendous advancement potential.
>
> (Letter from Business Careers Senior Vice President Leo Brody to Charles Gray dated July 11, 1974).
>
> He [Aguiar] is a most unusual man. Young, bright, definitely a comer, . . .
>
> (Letter from Mines to Charles Gray dated July 26, 1974).
>
> . . . Blair is a talented and aggressive young man . . .
>
> (June 6, 1975 letter from Business Careers to John Schumacher, then President of I. Magnin).
>
> Rest assured, Mr. Hughes, that we shall continue to recommend to you outstanding young men with Fashion Management experience as we have in the past.

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4. The Personnel Specification Sheet was changed two months before trial in this matter to delete the category "desirable age" (*Id.*, p. 2430).

(Letter from Business Careers Vice President Brody to William Hughes, then Vice President of Personnel at I. Magnin dated July 28, 1975).

John is a 'young man on the move' and potentially senior management material.

(Letter from Brody to Hughes dated November 9, 1977).

(Plaintiffs' Trial Exhibit 11).

Plaintiffs' Trial Exhibit 11, containing over 100 pages of references to "young" candidates for executive positions is perhaps best summarized in the July 22, 1974 letter written from then Vice President of Personnel for I. Magnin, Charles W. Gray, to Barbara Cohen, Placement Manager for Business Careers, in which Gray accepts Cohen's invitation to talk to a potential candidate with the following words: "We have nothing specific to talk about, but want to meet all the *bright, young ones* that we can." (Plaintiffs' Trial Exhibit 11; emphasis added).

In the first half of the decade, I. Magnin implemented its "planned introduction of younger personnel" in the sales and merchandising areas, an implementation admitted by Chief Executive Officer Ross Anderson at trial (RT, Trial Transcript, Vol. 20, pp. 3440-3441). Young employees were hired to sell to young customers; older employees were, acording to Anderson, "transferred" (*Id.*, p. 3441). Older employees were derided by I. Magnin management. Neal Fox, John Costello's immediate supervisor at the time of Costello's termination, labeled a 50-year old shoe buyer "an old shoe dog" and referred to a handbag buyer in her early 50's as "menopausal" and as buying handbags which

"looked as old as she did" (RT, Trial Transcript, Vol. 7, pp. 845-848).[5]

Lydia Dresnek, a co-buyer in Plaintiff Zelma Smith's division during the early 1970's, attested to a September 1973 conversation with her Divisional Merchandise Manager, David Mosson, during which Mosson called his buyers "old biddies," announced that "management wants to get rid of the old biddies" and concluded that "new blood" was needed. Even though Mosson reassured Dresnek, who was 45 at the time of the conversation, that her tanned, young look would protect her, approximately two years later Dresnek resigned because of the conversation and what she felt was "branding" on the basis of age (RT, Trial Transcript, Vol. 11, pp. 1616-1621).[6]

By October 1975 Ross Anderson was able to announce to the Federated Board of Directors, in a speech and slide program, that I. Magnin had made progress in attracting a youth market and in staffing with the young. Anderson's presentation contained the following description of I. Magnin junior departments:

> Here is our *Junior* presentation: The Young Delivery Service. Denims by JAG. Every bright, fresh, new look for the young, the fashion informed. *Staffed by the young, the fashion informed.* Young, bright, bouncy yes.

---

5. An order taken by Business Careers in May, 1975 sought a "young and promotable lady" for a casual handbag position (Plaintiffs' Trial Exhibit 11, order dated 5/29/75).

6. At the time the conversation with Mosson occurred, the six buyers in Dresnek and Smith's division were between the ages of the mid-40's and late 50's. By the time Dresnek left, three of the six were no longer with I. Magnin and had been replaced by persons in their late 20's and early 30's (*Id.*, pp. 1621-1623). At the time of her discharge in early 1978, Zelma Smith Ritter was from ten to twenty years older than other buyers in her division (RT, Trial Transcript, Vol. 5. pp. 532-533).

(RT, Trial Transcript, Vol. 4, pp. 322-325; Plaintiffs' Exhibit 34, pp. 2-3; [emphasis added]).

In the latter half of the decade, Federated turned its attention to three problems first delineated in the 1970-1975 Organization and Key Manpower Plan: the high median age of I. Magnin executives, the small number of promotable executives and the need to identify backup candidates for executive positions. In August 1976 Federated implemented a systematic study of such problems in the form of the Human Assets Inventory, a review of executives performed on two documents, an organizational chart and a summary of performance, potential and readiness (Plaintiffs' Trial Exhibits 14-18).[7]

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7. The Human Assets Inventory encompassed an analysis of those persons in key executive positions, including Divisional Merchandise Managers and Vice Presidents. I. Magnin personnel officials developed a conceptually similar device for the review of Buyers (RT, Trial Transcript, Vol. 2, pp. 65-66).

Human Assets Inventory reviews of I. Magnin key executives were completed by William Hughes, the Vice President or Senior Vice President of Personnel from July 1975 through April 1978, approved by Chief Executive Officer Ross Anderson and forwarded under the label "highly confidential" to Federated officials (RT, Trial Transcript, Vol. 2, pp. 57-58, 66-69). Each executive was evaluated in accordance with performance levels and promotional potential and placed on an overall organization chart.

The organization chart, characterized by Bernard Klayf, Federated Executive Vice-President, as "useful" in "succession planning," contained all relevant information to the Federated decision-making process: the individual's position, length of service, salary, the time in the position and, in the upper left-hand corner of each block, the employee's

age (RT, Trial Transcript, Vol. 16, pp. 2553, 2608-2609; Plaintiffs' Trial Exhibits 17 and 18).

Philip Cancellier's block on the Human Assets Inventory organization chart prepared in March 1977, a year before his termination, illustrates the succession planning implemented through this system. The block shows Cancellier's position of Vice President-Stores, his unbroken length of service of 17 years, his salary level of $70,000 and his age in 1977, 50. One of the individuals identified as a high potential backup for Cancellier's position, Henry Neloms, then age 43, in fact substantially assumed Cancellier's job duties in mid-1978 (Plaintiffs' Trial Exhibit 17; RT, Trial Transcript, Vol. 20, p. 3379).[8]

2. The Plaintiffs' Work Histories; The Application Of Federated's Age Discrimination Policy To Them And To Others

a. *Philip Cancellier*

Philip Cancellier commenced working for I. Magnin in 1953 at age 26; he was terminated effective May 1, 1978 at age 51. Except for an approximate six-month break in service in 1959, he was employed by I. Magnin for 25 years, working his way up from a Department Manager position

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8. Ages were placed on the Human Assets Organization Charts at the specific request of Federated (RT, Trial Transcript, Vol. 2, p. 75). When asked to explain the presence of executives' ages, Personnel Vice President Hughes testified that the Federated purpose was to "flag retirements and determine retirees' replacements." When asked how that explained the notation of ages in the 30's, 40's and 50's, Hughes stated "if you're going to put the age on there, you probably would put it in every box" (*Id.*, pp. 75-76). An examination of Plaintiffs' Trial Exhibits 17 and 18 discloses that of the approximate 60 persons identified on Plaintiffs' Trial Exhibit 17, 4 were in their 60's at the time the chart was prepared; only 2 of the 28 persons on Plaintiffs' Trial Exhibit 18 were in their 60's in 1977.

to Vice President-Stores/Operations, with overall operating responsibility for some 22 I. Magnin locations throughout the United States. Throughout his career, Cancellier gained wide exposure to both merchandising and operating aspects of retailing in positions ranging from Assistant Buyer, Buyer, Store Manager, Divisional Merchandise Manager to the Vice President posts held during the last 10 years of his career (RT, Trial Transcript, Vol. 3, pp. 242-258).

During his career with I. Magnin, Cancellier was consistently evaluated as a strong, aggressive executive who "got the job done". In the Organization and Key Manpower Plan prepared in 1970, Cancellier, then in his early 40's, was evaluated as a "fine young man—good for I. Magnin-Federated. Will be encouraged." and was labeled "energetic, a doer" (Plaintiffs' Trial Exhibit 1, p. 7851). During the last five years of his employment, Cancellier was evaluated by Ross Anderson, one of the individuals responsible for the decision to terminate Cancellier in early 1978 (Answer to Interrogatory No. 1, Plaintiffs', Trial Exhibit 57). Anderson rated Cancellier as good to excellent in performance appraisals completed in each of the four years preceding his termination (Plaintiffs' Trial Exhibits 30-33). In April 1973, Cancellier received an overall rating of good and was called "aggressive and dedicated to his job" (Plaintiffs' Trial Exhibit 30). In 1974, Cancellier was rated as excellent and labeled by Anderson "a bull-dog in pursuit in the operating elements of his job". In a review performed in early 1976, Cancellier received an overall rating of above average with the comment "a dedicated and able executive". In the last evaluation performed before his termination, Cancellier received an overall rating of between average and above average (Plaintiffs' Trial Exhibit 33).

Unbeknownst to Cancellier and completely apart from the written appraisal system performed on an annual basis, Cancellier was also a subject of the Human Assets Inventory. In the first such review dated September 30, 1976, Cancellier's performance was rated in the upper 25% or "very good"; he was evaluated as "promotable" within three years (Plaintiffs' Trial Exhibit 4, p. 7843; Plaintiffs' Trial Exhibit 14, p. 7287). In a span of just six months, questions were raised as to whether Cancellier's performance should be evaluated on the Human Assets Inventory as "very good" or "satisfactory to good" with the apparent only difference being a February 1977 decision that Cancellier was no longer deemed promotable to a principal position (Plaintiffs' Trial Exhibits 15 and 16).

Cancellier's termination was foreshadowed in a March 31, 1977 Federated memorandum stating that he was "no longer seen as a potential principal" and further noting that Henry Neloms, the 33-year-old individual who eventually took over Cancellier's duties, was "considered a replacement for Cancellier" (Plaintiffs' Trial Exhibit 5). On September 9, 1977, Hughes met with Ross Anderson to discuss various personnel matters. His notes of that meeting contain the following phrase about Cancellier and Neloms: "Will position P.C.—out in 6 mo. . . . Hank to second spot in stores." (RT, Trial Transcript, Vol. 2, pp. 133-140; Plaintiffs' Trial Exhibit 19).[9]

On January 3, 1978, Personnel Vice President Hughes, Chief Executive Officer Anderson and President Norman

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9. Describing himself as an "avid notetaker," Hughes testified that he routinely and regularly took notes of meetings concerning personnel determinations for the purpose, among others, of carrying out his job responsibilities (RT, Trial Transcript, Vol. 17, p. 2757). According to the testimony of I. Magnin President Norman Weehsler, "Mr. Hughes took notes at every meeting. He's a historian." (RT, Trial Transcript, Vol. 21, p. 3811).

Wechsler met. Hughes' notes from that meeting contain the following comments about Mr. Cancellier's future with the Company: "Phil C.—not a principal—dead end here . . . Age 50. Maximum potential!" (RT, Trial Transcript Vol. 2, pp. 142-143; Plaintiffs' Exhibit 20).

On January 5, 1978, Cancellier, for the first time, became aware of the decision to terminate his employment. Without warning, he was told by Ross Anderson that he was no longer considered for a Federated principal position, he could no longer continue to perform his responsibilities, he could possibly request one of two alternate positions, both of which were demotions and neither of which were then available, or he could leave the Company (RT, Trial Transcript, Vol. 2, p. 142; Vol. 4, pp. 284-288; Vol. 19, pp. 3149-3156; Vol. 21, p. 3796). Telling his supervisors that he was being offered only one real alternative, that of "leaving" the Company, Cancellier ceased working for I. Magnin effective May 1, 1978 (RT, Trial Transcript, Vol. 4, pp. 300-301). In June 1978 Norman Chesler, then an I. Magnin Vice President, related to Cancellier President Wechsler's statement regarding why Cancellier was terminated. Wechsler was quoted by Chesler as saying: "The people at Federated wanted them to get a lot of young people around here and he [Wechsler] was sorry he [Cancellier] was no longer there." (RT, Trial Transcript, Vol. 4, p. 329).[10]

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10. Chesler, who was still a Vice President at I. Magnin at the time of trial in this matter, testified regarding his version of the conversation with Wechsler. Chesler admitted that the conversation concerned Cancellier's leaving the Company and quoted Wechsler as saying "we've got to get some young blood in here and I guess we all have to go along one of these days" (RT, Trial Transcript, Vol. 19, pp. 3311-3312).

b. *John Costello*

John Costello, who started with I. Magnin in 1961 as an Executive Trainee, held the position of Divisional Merchandise Manager, Division V (Accessories), at the time of his termination on May 1, 1978 at age 54 (RT, Trial Transcript, Vol. 7, pp. 759-763).

From September 1975 when Costello assumed responsibility for Division V, through 1977, the last full year of Costello's employment, Division V, either singly or in a tie with one other division, led all other I. Magnin divisions in the area of gross merchandise margin percent, a measurement of the percent of profits to dollars (RT, Trial Transcript, Vol. 13, pp. 1875-1876; Plaintiffs' Trial Exhibits 39-A through 39-D). Costello consistently increased the sales of Division V each year, starting from slightly over $12 million in 1975 to approximately $14.4 million at the end of 1977 (Plaintiffs' Trial Exhibit 39-I).

From 1976 to 1977, Division V experienced a 12.1% increase in sales growth; Costello outproduced seven of the eleven divisions in this figure the year preceding his termination (RT, Trial Transcript, Vol. 7, pp. 834-835; Vol. 13, pp. 1916-1917). Division V also exhibited consistent growth in the area of gross merchandise margin profit dollars, the dollars available to run the business (RT, Trial Transcript, Vol. 13, p. 1875). In the year preceding Costello's termination, Division V experienced a 9.89% increase in gross merchandise profit dollars over 1976; a figure that was average when compared to the performance of other divisions during that same period (*Id.*, p. 1919). In sum, in every year in which Costello was responsible for Division V, he increased sales and profit; in each year Division V

led the Company in gross merchandise margin percent (RT, Trial Transcript, Vol. 13, pp. 1915-1921).[11]

John Costello received two written appraisals of his performance as the Accessories Divisional; both rated his overall performance as between average and above average, defined by I. Magnin's employment policies as meeting "minimum requirements of position-adequate" [average] and meeting "requirements of position without weakness" [above average] (Plaintiffs' Trial Exhibits 36 and 37). Indeed, written personnel policies generated by Vice President Hughes to provide a "meaningful executive appraisal system" specifically stated that personnel rated as average were not "to be considered in any way as marginal performers" (Plaintiffs' Trial Exhibit 13, pp. 413 and 415).[12]

John Costello, like Philip Cancellier, was labeled non-promotable, a characterization appearing in a January 1976 Federated memorandum stating *"John Costello"* "good but career in this level" with "career" being a phrase used to denote non-promotability in the Human Assets Inventory scheme (Plaintiffs' Trial Exhibit 2; Plaintiffs' Trial Exhibit 14, p. 7287). As early as September 1976, when concededly no decision had been reached that Costello was not capably performing his Divisional position, I. Magnin was searching for a replacement (RT, Trial Transcript, Vol. 20, pp. 3533-

11. The first time that Division V experienced slippage from its number one place among all divisions in the category of gross merchandise margin percent was in 1978, a pattern which continued in 1979 with one-half of 1978 and all of 1979 being the responsibility of Costello's replacement, Joyce Coddington-Harrington, whose age was defined by Costello's supervisor, Neal Fox, as "on the sunny side of 40" (RT, Trial Transcript, Vol. 10, pp. 1308-1309).

12. A third, undated appraisal was prepared only after the decision to discharge Costello had been reached and was first seen by Costello in conjunction with a review of his personnel file undertaken at the time of termination (Plaintiffs' Trial Exhibit 38; RT, Trial Transcript, Vol. 7, pp. 812-813).

3534; Plaintiffs' Trial Exhibit 3). The only determination which had been reached about Costello at that time was that he was "not promotable" (Plaintiffs' Trial Exhibit 22, p. 7840).

In April 1977 Fox, Anderson, Wechsler and Hughes discussed Divisional Merchandise Managers. It was decided to remove Costello from his position; Hughes' notes of that meeting contain a reference to Costello's age. The notation of the discussion on Costello starts "Costello 53→ "; the reference being to Costello's age and characterized by Hughes at trial as a "doodle" (RT, Trial Transcript, Vol. 2, pp. 156-167; Plaintiff's Trial Exhibit 23).

Hughes' notes of the April 1977 discussion also record a plan of withholding from Costello the knowledge that he was to be removed from the Divisional job because of I. Magnin's concerns that Costello might precipitiously leave the position before a replacement had been found. The plan was to tell Costello about the availability of a new position in the I. Magnin hierarchy, a position which Defendant's officials knew would be filled by another individual (RT, Trial Transcript, Vol. 2, pp. 168-170; Vol. 7, pp. 790-792; Vol. 21, pp. 3774-3775). Hughes' note reads: " — hint at future—but don't tell yet. 'We need replacement first'—if pressed — we have another job same level." (Plaintiffs' Trial Exhibit 23).

In late January 1978 and only because Costello presented an income verification form for a bank loan did I. Magnin officials tell Costello of their April 1977 decision to terminate him (RT, Trial Transcript, Vol. 2, pp. 175-176; Vol. 7, pp. 803-805).

c. *Zelma Smith Ritter*

Zelma Smith Ritter had worked for I. Magnin over 18 years at the time of her termination on January 6, 1978 at

age 52. Starting as a Salesperson, Ritter became an Assistant Buyer and thereafter a Buyer of coats and suits, an area in which Ritter specialized throughout her career (RT, Trial Transcript, Vol. 5, pp. 461-462).

From 1973 through 1976, and despite several changes in her buying responsibilities, Ritter consistently improved her departments' performance in sales and gross margin dollars. Ritter's sales volume in 1973 was approximately $1.96 million; in 1976 sales had increased to approximately $3.6 million. In the area of gross margin dollars, Ritter improved from a 1973 figure of approximately $860,000 to a 1976 figure of $1.58 million (RT, Trial Transcript, Vol. 5, pp. 512-520; Plaintiffs' Trial Exhibits 42-A and 42-B).

In 1977, Ritter was transferred from Division III to Division II with a change from responsibility over five departments (three for one-half year) in 1976 to responsibility for only three departments in 1977. The realignment allowed more concentration on the development of business for Stanley Sherman goods (RT, Trial Transcript, Vol. 5, pp. 546-547). With less volume, Ritter managed to keep her sales and gross margin dollars relatively stable in 1976 and 1977; if comparative figures are utilized, Ritter experienced a 7.7% growth in sales during the year preceding her termination and a 9.1% increase in gross margin dollars (RT, Trial Transcript, Vol. 5, pp. 547-549; Plaintiffs' Trial Exhibits 42-A and 42-B).

In early 1977, Ritter was evaluated by her then supervisor, Robert Benham, as having an 8% net sales increase in 1976 over 1975 (Plaintiffs' Trial Exhibit 41, p. 129; RT, Trial Transcript, Vol. 16, pp. 2528-2529). The 8% increase in net sales was almost double that experienced by Ms. Ritter's division as a whole, which showed only a 4.7% increase in that area (*Id.*, pp. 2528, 2532-2533). Again,

comparing 1976 to 1975, Ritter outstripped her division in the area of gross merchandise margin dollars with Ritter's departments showing an increase of 5.6% and the division having an increase of only 2.6% (*Id.*, pp. 2532-2534). In the area of gross merchandise margin percent, the division experienced a decline which was greater than that of Ms. Ritter's departments (*Id.*, pp. 2535-2537). Ritter out produced the division in each measure of performance even though her responsibilities were reduced in 1976 (*Id.*, pp. 2531-2532).

In 1975, Ritter produced 15% of the total division's sales, a figure increased to 16.2% in 1976. In 1977, the last year of her employment, Ritter contributed 20.4% of her division's sales even though she was only one of nine Buyers, a percentage contribution almost double that which would be expected of equally proportionate contributions from all Buyers (RT, Trial Transcript, Vol. 5, pp. 549-550). A major portion of Ritter's responsibilities during the year preceding her termination was the development of the Stanley Sherman business; that development was additionally an objective of Ritter's immediate supervisor, Divisional Alvin Somers. Following Ritter's termination, Somers and his division were praised in a written performance evaluation for having attained the goal of developing a strong Stanley Sherman business (RT, Trial Transcript, Vol. 15, pp. 2348-2354).

In a written performance appraisal dated April 5, 1976, Benham evaluated Ritter's performance as above average and wrote, "a strong experienced buyer in an otherwise green division" (Defendant's Trial Exhibit ZSR-4). Shortly after that evaluation, Zelma Ritter, like her co-Plaintiffs, was labeled "non-promotable". Hughes' notes of a meeting

with Anderson and Wechsler held on April 16, 1976 record the conclusion that Ritter would not be promoted to a Divisional position with the words "never as a DMM" (RT, Trial Transcript, Vol. 3, pp. 186-189; Plaintiffs' Exhibit 25). The I. Magnin officials also discussed that two Buyers would be required to replace Ritter. Finally, Hughes' notations indicate a concern with Ritter's salary level; the note states: "Must level w/her.! Re: comp and position ✓ ✓ slow or no later increases." (RT, Trial Transcript, Vol. 3, pp. 187-188, 191; Plaintiffs' Exhibit 25).

In December 1976, following the determination of non-promotability, Benham prepared a memo criticizing Ritter for the use of profanity and emotionalism (RT, Trial Transcript, Vol. 16, p. 2487).[13]

As in the case of her co-Plaintiffs, a Hughes document exists showing notation of Ritter's age in conjunction with a discussion of her future employment with I. Magnin. On December 22, 1976, a Hughes memorandum of a conversation with Benham regarding Ritter states "Discussed need for objective performance documents."; that notation is accompanied by a calculation of Ritter's age and length of service (RT, Trial Transcript, Vol. 3, pp. 202-203; Plaintiffs' Trial Exhibit 26).

Following the Hughes-Benham discussion of the need for "objective performance documents," Benham prepared the last review received by Ritter prior to her discharge. That review, dated March 15, 1977, gave Ritter an overall rating of between average and below average even though

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13. Testimony from Defendant's own witnesses established that retailing is a tough, aggressive business (RT, Trial Transcript, Vol. 16, p. 2518). Thirty-nine year old Store Manager, Lucy Zahran conceded at trial that she had sworn and lost her temper while on I. Magnin business but had never been criticized for either action by her employer (RT, Trial Transcript, Vol. 17, pp. 2917-2918).

Ritter received an average, above average or excellent rating in 20 of the 23 categories set forth in the review (Plaintiffs' Trial Exhibit 41). That review also speaks of Ritter's "lagging behind the division" even though Ritter surpassed the division in each of the three categories measuring merchandise performance (*Id.*, p. 127; see discussion, *supra*, pp. 18-19).

In February 1977 Ritter was transferred to Somers' division; within weeks of that transfer, Somers began to criticize Ritter for the manner in which she performed the routine aspects of her job and commenced a course of harassment, including shouting and calling her "stupid," that was to continue until the time of her discharge (RT, Trial Transcript, Vol. 5, pp. 528-540). In October and December, 1977, both Somers and Hughes again asked Ritter whether she would resign; when she refused, she was discharged effective January 6, 1978 (RT, Trial Transcript, Vol. 6, pp. 556-558). She was replaced by three younger buyers (RT, Trial Transcript, Vol. 10, pp. 1309-1310).

d. *Other Similarly-Situated Executives*

In 1976, the year the Human Assets Inventory was introduced, Federated also instituted the Supplementary Retirement Plan under which an executive, making at least $30,000 per year, could qualify to receive additional retirement benefits guaranteeing a payment level of at least 40% of the individual's salary, defined as the average of the three highest years of compensation in the five years preceding retirement. The plan was unfunded; there were both length of service and age requirements for qualification. Those executive employees earning at least $30,000

per year who had both long tenure and higher age were thus potential recipients of the 40% guarantee (Plaintiffs' Trial Exhibits 28 and 29).

From the inception of the plan to the time of trial, only three individuals had ever qualified for receipt of supplementary retirement benefits (RT, Trial Transcript, Vol. 12, pp. 1737-1738). In a statistical analysis of the involuntary terminations occurring during the period 1976 through 1979 among persons in Plaintiffs' age group potentially qualified to receive the supplementary benefits because they were executives earning at least $30,000 per year, it was found that the likelihood of such terminations occurring by chance was less than 1 in 100 (RT, Trial Transcript, Vol. 10, pp. 1385-1386).

Each Plaintiff's length of service and age were considered in conjunction with the decision to terminate employment. In the December 1976 Hughes note containing a calculation of Ritter's age, there also appears a calculation of Ritter's length of service (Plaintiffs' Trial Exhibit 26, RT, Trial Transcript, Vol. 3, p. 203). In the April 1977 Hughes note regarding Costello's future with the Company, Costello's length of service appears immediately following his age (Plaintiffs' Trial Exhibit 23, p. 7011). In October 1977 Hughes directed an official of the Personnel Department, William Taylor, to prepare a listing of benefits which would be available to Cancellier if he were terminated at age 50. The memorandum received by Hughes notes "SRP - coverage ceases" (Plaintiffs' Trial Exhibit 84, p. 231). Absent termination, Ritter would have been entitled to receive Supplementary Retirement Plan benefits in 1984; Cancellier would have qualified in 1985; Costello would have been eligible in 1986 (Plaintiffs' Trial Exhibits 67, 68 and 69).

In 1970, at the time the Federated Organization and Key Manpower Plan commented upon the "high median age" of I. Magnin executives, 68% of I. Magnin employees in job classifications held by the Plaintiffs (Vice Presidents, Divisional Merchandise Managers and Buyers) were 40 years of age or older. At the end of the decade which began with the announcement that Federated should consider the "planned introduction of younger personnel" at I. Magnin, 67% of individuals in those three positions were under the age of 40 (Plaintiffs' Trial Exhibit 49; RT, Trial Transcript, Vol. 10, pp. 1371-1373).

Appendix E-2

Statement of Facts in Defendant's Opening Brief (Pages 8-19) and Addendum (Pages 1-6)

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(b) ADDITIONAL FACTS RELEVANT TO THE SEPARATE EMPLOYMENT SITUATIONS OF EACH PLAINTIFF AND TO THE GROSSLY EXCESSIVE VERDICTS RETURNED BY THE JURY.

(i) Cancellier.

The verdict (CR 530) in favor of Cancellier, who was earning $70,000 per year in one of the positions eliminated by management reorganization, was 6.7 times greater than his maximum recoverable ADEA back salary loss at the time of trial. This windfall was awarded to an employee who left to pursue personal business interests in spite of I. Magnin's offers of continued employment in two other positions of somewhat reduced responsibility at $60,000 per year. (RT 3355-56; Defendant's Trial Exhibit ["D.T.Ex."] PC 12.) These opportunities were offered to Cancellier out of consideration for his length of service (he was hired in May of 1953 and, after leaving to go into business for himself in 1959, rehired in June of 1960), and in recognition of his continuing value as an executive, notwithstanding the performance difficulties that in part had contributed to the elimination of his position as the supervisor of operations for I. Magnin's 22 branch stores. Cancellier flatly rejected the possibility of continued employment and instead negotiated for and received from I. Magnin a $70,000 severance payment.[11]

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11. Prior to leaving Cancellier had shared direct supervisory responsibility for the stores with Norman Chesler, then the 61 year old Vice President of Stores/Merchandising. (RT, 3294; D.T.Ex. PC-8.) Chesler's position also was eliminated by the same management reorganization, but he elected to continue employment with

The principal facts and events which led to what I. Magnin submits was Cancellier's *voluntary* resignation are as follows. Beginning in 1976, Ross Anderson, then the 56 year old Chairman and Chief Executive Officer of I. Magnin, began to have doubts about Cancellier's performance after various operations problems and complaints from branch store personnel and others came to his attention. (RT 1901-02; 3410-12; D.T.Ex. PC-9.) In 1977 Anderson became increasingly concerned about Cancellier's inability to provide high caliber leadership and about his inflexibility. (*Id.*, p. 2.) Anderson and Norman Wechsler, then the 65 year old President of I. Magnin,[12] also were concerned that both Cancellier and Chesler were not always effective in their shared, direct supervisory relationships with the store managers. (RT 3351-52; 2825-26.)

In addition, Anderson, Wechsler, and William Hughes, I. Magnin's Vice-President of Personnel, determined by the Fall of 1977 that better management of and communications with the 22 branch stores could be accomplished if there was just a single Vice-President of Stores, with centralized responsibility for both the stores' operations and merchandising activities, rather than having those responsibilities divided between the two positions held by Cancellier and Chesler. (RT 3353; D.T.Exs. PC-6 and 12.) In 1977 and early 1978, a management reorganization plan was deve-

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I. Magnin in a staff vice-presidency of somewhat reduced responsibility in his merchandizing area of expertise. I Magnin offered this alternative position to Chesler out of the same considerations, i.e., length of service and recognition of his continuing value as an executive, which motivated the offers that Cancellier rejected, (RT 3298-99; D.T.Exs. PC-3, Doc. 1225-26, and PC-12, Doc. 1221, 1236.) Chesler's responsibilities subsequently increased again, and at the time of trial he was the Regional Vice President for Northern California and the Pacific Northwest. (RT 3296.)

12. Wechsler previously had been the President of Saks Fifth Avenue, and was hired to be President of I. Magnin following his retirement from Saks in 1975. (RT 3768.)

loped which implemented the initial steps toward consolidating the responsibilities of the Vice-President Stores/Operations and the Vice-President Stores/Merchandising positions into one new position, which was entitled Senior Vice-President/Stores and assigned an authorized salary level of $90,000 per year. (RT 2421; D.T.Exs. PC-8 and 14.) Neither Cancellier nor Chesler were considered qualified for this newly created position, and an executive search for outside candidates was commenced. In the interim, until the new Senio. Vice-President/Stores position could be filled, all store managers were ordered to report directly to Anderson and Wechsler instead of Cancellier and Chesler. (RT 3769-70; D.T.Ex. PC-8.)

In the meantime, Cancellier retained his title of Vice-President, remained a member of the I. Magnin Executive Committee, and temporarily was assigned a staff role with continuing responsibilities for store operations, reporting directly to Anderson. (RT 2849-51; 2877-78; D.T.Ex. PC-8.) Chesler also was assigned a staff role, with the title Vice-President/Merchandise Administration, with continuing but somewhat reduced responsibilities for various merchandising activities reporting directly to Wechsler. (RT 3979-99; D.T.Ex. PC-8.) Anderson also offered Cancellier permanent continued employment opportunities as the Vice-President/Store Manager of either I. Magnin's flagship Union Square store, or the Chicago store, with the latter position involving the added opportunity of becoming the Regional Vice-President who was to be based in Chicago.

Cancellier was encouraged by Anderson and Wechsler seriously to consider continuing his employment with I. Magnin, especially as the Vice-President/Store Manager at Union Square. (RT 3354-55; 3771-73.) Cancellier flatly rejected these offers, which throughout this litigation he

has characterized as non-existent shams used to set him up, or worse. (RT 423; CR 490, pp. 317-19, 323-24, 337.) Cancellier became embittered about staying with I. Magnin, stating that he had no desire to remain with I. Magnin or Federated, and that he only desired to be "* * * treated fairly financially so that I may enter into new challenges." (CR 579, filed Feb 17 1981.)

* * *

(ii) Ritter.

The verdict (CR 528) in favor of Ritter, who was earning $35,500 per year as a Buyer of women's sports apparel at the time she was involuntarily terminated effective January 6, 1978, was 8.9 times greater than her maximum recoverable ADEA back salary loss at the time of trial. This grossly excessive recovery was awarded to an employee whom I. Magnin management repeatedly had counseled and warned about her use of abusive, obscene and scatological language to or in the presence of co-employees, vendors and customers, about her chronic inability to deport herself in a professional manner, and about the increasingly unsatisfactory merchandising results in her departments. Because of her length of service (she was hired in August of 1959), two I. Magnin supervisory teams unsuccessfully attempted to stop her outrageous conduct and to improve her faltering merchandising performance.

The utterly appalling nature of the misconduct which led to Ritter's involuntary termination is best illustrated by the testimony of those who had the misfortune of experiencing it. A good example is the insubordinate flaunting of her lack of respect for immediate superiors:

> "She said that Mr. Benham [the Divisional Merchandise Manager then her immediate supervisor] could roll the memo tightly and insert it in his ass, and that

> he could fuck himself with it." (This statement was made by Ritter in a loud voice to a co-employee, in the presence of customers, on the sales floor of the Rive Gauche department at the Union Square store; trial testimony of Amanda Burton, RT 1990, lns. 23-25.)
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> • • •
>
> "Well, among other things, she said that she was • • • 'tired of my shit,' • • • that she would go upstairs to the eighth floor, see Mr. Wechsler [then President of I. Magnin] and tell him how I was wasting her time with this shit. She said that I was dealing in gossip, that she had the facts on me and she would use them when she was ready." (Trial testimony of Robert Benham, RT 2478, ln. 21 to 2479, ln. 1.)

Other examples include her inexcusable disparagement of I. Magnin vendors, her blatant attempts to turn them against I. Magnin to advance her own personal interests, and the foulest possible insults which she repeatedly made to or about co-employees and others. (Testimony representative of these aspects of Ritter's misconduct is set forth in the Addendum [Addm.] to this brief at pp. A-1 to 4.) Shortly prior to her termination, Ritter also engaged in a 10-minute screaming fit and enraged tantrum in the presence of I. Magnin customers and employees who were attending a special showing of merchandise at the Phoenix Store. (Addm. at p. A-2 and 3.)

This is representative of the misconduct which prompted Wechsler to testify that Ritter was "almost a cancer" in the I. Magnin organization (RT 3779, ln. 23 to 3780, ln. 4), and which prompted Anderson to testify that Ritter "• • • had established a pattern for herself over these several years that would not have allowed her to go into another job with the company and be respected and accepted for

it." (RT 3450, lns. 9-12.) Ritter was given a $17,750 severance payment. (RT 661-62; P.T.Ex. 67.)

* * *

(iii) Costello.

The verdict (CR 529) in favor of Costello, who was earning $45,000 per year as the Divisional Merchandise Manager (DMM) of Accessories at the time he was involuntarily terminated effective May 1, 1978, was 6 times greater than his maximum recoverable ADEA back salary loss at the time of trial. This excessive recovery was awarded to an employee who, in the judgment of all his superiors during the years immediately prior to his termination, had generated poor morale and a lack of respect among his subordinates, had repeatedly demonstrated that he did not have the high-fashion merchandising and leadership skills required for a DMM level position, and had finally culminated a checkered career by twice failing over several years to perform competently in two different DMM positions.

There was substantial evidence to support this low assessment of Costello's qualifications as a DMM. It was an assessment uniformly shared by his subordinates, his immediate supervisors, and I. Magnin's top executive officers. Again, as in the case of Ritter, their testimony is the best illustration:

> "* * * As the President of the store, and one responsible for the merchandising results of the company, and the organization, I did not believe that Mr. Costello was doing his job properly.
>
> "He was not producing the results that we wanted in fashion leadership. He was not producing the results we wanted in developing buyers and giving them the expertise, his expertise, coaching them on the fundamentals. He was shady in his market relations. We were getting poor reports about that.

"And, on overall balance, I felt the company would be better off with having another individual in that important position.

"Q. Was [sic] there any other considerations you recall?

"A. The—the profit figures had been decreasing, the gross margin figures had gone down."

(Trial testimony of Norman Wechsler, RT 3776, ln. 16 to 3777, ln. 6.)

• • •

"Q. Did you receive complaints from Mr. Fox[13] as to Mr. Costello's performance?

"A. Yes, I did.

"Q What were those complaints?

"A. That John was not a sufficiently oriented fashion merchant to handle the fast moving Accessory Division. He did not have the feel for the goods.

The other side of it was he was also not a good leader and had not gained the respect of his buyers."

(Trial testimony of Ross Anderson, RT 3368, ln. 21 to 3369, ln. 4.)

Other representative examples of testimony relevant to Costello's termination are included in the Addm. at pp. A-4 to 6. But the district court's prejudicial exclusions of evi-

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13. Neal Fox, the Vice President—General Merchandise Manager (GMM) who was Costello's immediate superior during the two years leading up to his termination, also had four other DMMs reporting to him. (RT 3475-76.) In the process of concluding that Costello must be terminated Fox reached the identical conclusion with respect to another of his DMMs named Bruce Leitstein. (RT 3528-29.) Leitstein and Costello were 38 and 54 years old, respectively, had comparable lengths of service (15 and 16½ years), and had comparable salaries ($47,000 and $45,000 per year), at the time Fox recommended that they both should be terminated for unsatisfactory performance. (RT 3523; 3519-20.) The district court erroneously excluded much of the testimony I. Magnin sought to introduce on Leitstein's obviously relevant comparative termination, and it prejudicially disparaged and emasculated the limited evidence which it did admit regarding Leitstein.

dence prevented the jury from hearing almost all of the testimony regarding the inappropriate sexual and personal remarks and conduct which went to the heart of Costello's unsatisfactory working relationships with his buyers and assistant buyers, almost all of whom were women. I. Magnin's offers of proof to establish that Costello's poor performance also involved these additional serious problems are included in the Addm. at pp. A-6 and 7. And there was substantial evidence with respect to Costello's inability to perform competently in another DMM position several years earlier. (Addm. at p. A-8.)

Out of consideration for Costello's length of service (he was hired in July of 1961), I. Magnin considered reassigning him to yet another position, but this possibility was foreclosed by the same management reorganization that had eliminated Cancellier's position.[14] When Costello failed to improve his performance as a DMM he was notified that he would be terminated effective May 1, 1978, and was given a $22,500 severance payment.

• • •

(c) ADDITIONAL FACTS RELEVANT TO I. MAGNIN'S NON-AGE RELATED MOTIVATIONS FOR THE BUSINESS DECISIONS WHICH AFFECTED PLAINTIFFS' CONTINUED EMPLOYMENT.

None of the top I. Magnin decision makers (see Addm. at pp. A-8 and 9 for their ages), or for that matter any of the other I. Magnin executives employed during most of the last decade, had ever even seen, much less read or attempted to implement, the out-of-context statements which plaintiffs

14. The efforts by I. Magnin to salvage Costello's career formed the basis of his unsuccessful fraud and negligent misrepresentation claims, on which the jury returned separate defense verdicts. (CR 531 and 532.)

lifted from several of their major exhibits to claim that I. Magnin had a discriminatory policy of "the planned introduction of younger personnel." (RT 3104; 3350-51; 3784-85.) This six word phrase, which was repeated to the jury literally dozens of times throughout the trial, was taken out of context from plaintiffs' Exhibit 1, a 176 page organizational planning document prepared by now unknown individuals on the parent corporation's staff, dated February 10, 1970 and entitled "I. Magnin Organization and Key Manpower Plan (1970-1975) Draft III."[15] (RT 33, 3440-43, 3970-71, 3973-74, 4027.) Plaintiffs also repeatedly emphasized to the jury several statements taken from their Exhibit 46, which consists of six randomly selected pages (Nos. 9-12, 19 and 20) from what apparently was at least a 20

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15. This corporate staff analysis of I. Magnin's projected expansion in number of stores and personnel for the 1970-75 period noted that an unusually high percentage (almost 20%) of the key executive group was nearing retirement, and that the average age of the entire key executive group was substantially higher than the corporate wide median. An understandable concern was expressed about the need to identify experienced back-up and additional candidate to fill executive positions which would be vacated by retirement or created by expansion.

It is in this context, and this context only, that the unknown author of the analysis simply suggests that:

> "• • • a review of Magnin's profit sharing plan (upon which executives largely depend for retirement) may be timely. Magnin's should be certain that its benefits are adequate for all executives.
>
> A more subtle question relates to the implications of this age distribution upon Magnin's goal to have increasing impact in the youth market. An aging study of the rest of Magnin's management might disclose the need for the planned introduction of younger personnel—particularly in the merchandising and sales areas."

Significantly, there was no evidence that the suggested "aging study" was ever conducted, much less evidence that such a study had disclosed a "need for the planned introduction of younger personnel." (RT 2136-37; 3446-47.)

Further, executive turnover at I. Magnin was so high during the 1970's that none of the trial witnesses were even aware of this outdated staff analysis until it was brought to their attention in connection with this litigation. (RT 3106-07; 3350; 378-85).

page (or longer) overview of merchandising concepts prepared in the fall of 1969 for certain selling departments by a former I. Magnin DMM named Eric Steiner. (RT 2389-90; 2408; P.O.B. at 4) Steiner testified that this document was not a basis for any personnel decisions, particularly decisions affecting older sales persons at I. Magnin, many of whom were past the mandatory retirement age. (RT 2411-12.)

Both plaintiffs' Exhibit 1 and Exhibit 46 clearly were remote in time from the events in issue, and were totally irrelevant since they never had even been seen by any of the I. Magnin executives whose decisions some 8 years later affected the employment status of plaintiffs. But these erroneously admitted exhibits were susceptible to numerous out-of-context references to age by counsel for plaintiffs which were enormously prejudicial to I. Magnin.

An out-of-date form, entitled "Personnel Specification Sheet," which was used at the parent corporation's executive recruitment office in New York City, is another of plaintiffs' key exhibits which was never seen by any of the I. Magnin decision makers. (P.T. Ex. 7.) This is the form that contained the "desirable age" information category which Federated Vice-President, J. L. Tonner, testified either was left blank or was simply filled in "open" from the time she became responsible for the recruitment office in 1970. (RT 2417, 2420.) And this is precisely what was done when Tonner responded in February of 1978 to I. Magnin's request for an executive search to fill the new Senior Vice-President/Stores position that replaced the two lower-level positions previously held by Cancellier and Chesler. (P.T. Ex. 7; D.T. Ex. PC-14). It also is what was done with respect to Tonner's search for a new DMM of Accessories to replace Costello. (D.T. Ex. JC-17.) Age was as irrelevant to

Cancellier's and to Costello's departures from I. Magnin as it was to the search for their replacements.[16]

Finally, out of the more than 1,000 pages of handwritten and typewritten notes made by Bill Hughes during the approximately 3 years he was I. Magnin's Vice-President of Personnel, plaintiffs have lifted out of context a handful of notes which contain personnel data that occasionally refers to age. Hughes' notes in fact reflect literally hundreds of separate references to the management reorganization that eliminated Cancellier's and Chesler's positions, and to the extensive discussions and efforts by Anderson, Wechsler and Hughes to find continued employment opportunities for both individuals. These notes also contain repeated references, over approximately a 2 year period, to the constant concern of these top I. Magnin executives over the substantial misconduct and merchandising performance problems which led to Ritter's and to Costello's terminations. (D.T. Exs. PC-1 to PC-8, PC-12, JC-14 and ZR-2; RT 2843-47, 2995-3001, 3078-81, and 3086-90.)

• • •

16. The most sought after candidate to replace Costello was Anne Kartushyn, an experienced and highly qualified DMM working for an I. Magnin competitor in New York. At 48 or 49 Kartushyn was essentially in the same age bracket as all three plaintiffs, including Costello, and I. Magnin offered her $57,000 per year ($12,000 more than Costello was then making) to come to San Francisco. (RT 2429; D.T.Ex. JC-12.)

REPRESENTATIVE TESTIMONY RELEVANT TO RITTER'S TERMINATION

"Keep your fucking mouth shut." (Trial testimony of Ritter's last immediate supervisor, Alvin Somers, regarding Ritter's treatment of one of I. Magnin's most important vendors, RT 2191, ln. 24 through p. 2192, ln. 1.)

• • •

". . . Mrs. Ritter had been telling a vendor, 'I don't know how my customers are going to get their fucking tits into your goddamn dresses.' " (Trial testimony of Joan Greenfield, a co-employee whose distress over this statement by Ritter to another vendor prompted her to complain to Benham about this and other Ritter outbursts, RT 2656, lns. 10-13.)

• • •

"I told Mr. Benham I could not work in my office, and I was asking him if I could use his secretary's other desk to work. . . . I told him that it was difficult to work because of Mrs. Ritter's shouting and use of profanity." (*Id.* RT 2655, lns. 18-20, 25; 2656 ln. 1.)

• • •

"Well, Mr. Sherman called me and told me that he is under tremendous pressure from her. She had been calling him continuously to ask him to threaten me that unless she is—unless she is taken off warning he will stop selling to us." (Trial testimony of Mordechai Schafman, the Vice President-General Merchandise Manager who was Somers' immediate superior, RT 2679, lns. 17-21.)

• • •

"I received a phone call the following day after my dis-

cusion. Mr. Sherman was quite upset. He wanted to tell me that Mrs. Ritter had called him and asked him to pull out of I. Magnin, not to sell I. Magnin, if in fact Mrs. Ritter was not the buyer." (Trial testimony of Alvin Somers, RT 2252, lns. 11-15.)

"That fucking cunt couldn't sell anything." (Trial testimony of Deborah Winston with respect to another statement made by Ritter, on the selling floor, RT 1976, lns. 15-25; Ms. Winston also recalled Ritter referring to Mr. Benham as a "fucking idiot." *Id.*, RT 1977, lns. 1-2.)

• • •

"Well Mrs. Ritter would go to the floor generally every morning and she would go to the floor and would upset the sales people by sometimes calling them dumb or calling them lazy and on several occasions, it results in tears and many problems." (*Id.*, RT 1975, lns. 9-13.)

• • •

"Q. Mrs. Dirks, did you approach Mrs. Ritter and say anything to her?

"A. Yes, sir. Yes.

"Q. What happened at that time?

"A. I asked her what the problem was and she would not give an answer.

"Q. What did she do?

"A. She just kept screaming.

"Q. And when you say 'screaming,' do you mean by that literally?

"A. Yes.

"Q. All right.

"A. In a very loud voice.

"Q. Using profanities and obscenities?

"A. Yes."

(Trial testimony of Carolyn Dirks, then I. Magnin's

Phoenix Store Manager, RT 1948, lns. 9-25; Ms. Dirks also testified that throughout Ritter's profane and obscene tantrum "the most mild word was 'shit'." RT 1958, ln. 1.)

• • •

"Q. Will you tell us the reasons, please, why you concurred in the discharge or made your decision to discharge Mrs. Ritter?

"A. Well, my opinion of Mrs. Ritter's performance in her position in the organization. I felt that she had a demoralizing effect on the organization. I felt she was very disruptive and very derisive.

And, regardless of her actual performance, I think she was almost a cancer in her particular organization, and it was affecting our market relations, too.

"Q. You mentioned a moment ago about Ms. Ritter's market relations. What was your knowledge of them? (Trial testimony of I. Magnin President, Norman Wechsler, RT 3779, lns. 16-25).

• • •

"A. Well, two incidents: Whenever I visited New York I made an appointment to see as many manufacturers as I could. And I usually did this by myself.

And in one of them, Kimberly, for instance, the personnel there, the General Sales Manager said to me, 'There was no way we could ever do a good job with them because Mrs. Ritter was confused, indecisive. She really would come back and back and not know what to do. And we had already missed the first cuttings and we would be fortunate if we got into the second cuttings,' which meant our deliveries would be later than any of our competitors." (*Id.*, RT 3783, lns. 11-23.)

• • •

"Q. Did you look at that review before you approved her termination, Mr. Wechsler?

"A. No, I did not, because there had been so many strikes against Mrs. Ritter that, as I said, she had become a demoralizing, cancerous influence on the store, in my opinion and, as the President and Chief Operating Officer, with the responsibility for the merchandising, I strongly believed that the store would be better off without her." (*Id.*, RT 3809, lns. 7-14.)

REPRESENTATIVE TESTIMONY RELEVANT TO COSTELLO'S TERMINATION

"Q. Speaking about his [Costello's] relations with people, Mr. Fox, you talked on your direct testimony about playback from the buyers. Do you recall that?

"A. Yes, I do.

"Q. And you said that he had not generated the respect of the senior buyers; isn't that right?

"A. That is true.

"Q. You also stated that Diane Durham gave you, and I think this is a quote, chapter and verse, closed quote, on John Costello; do you remember that?

"A. Yes.

"• • • Ms. Durham and I had a lengthy conversation after this review is committed to paper with regard to Mr. Costello. But, prior to that there were comments dropped by many people about Mr. Costello's ability or inability to cope with people and relationships in terms of playback and assistance, staff people, people he interacted with on a day to day basis.

"Q. So your testimony now is that Ms. Durham spoke to you directly in terms of John Costello specifically?

"A. • • • I had a lengthy conversation with Ms. Durham in regard to Mr. Costello at the time that I told Ms. Durham that she was going to be elevated to a divisional job in

another area. And at that time she in effect spilled her guts to me in regards to John Costello.

Out of a cumulative basis but prior to that on occasion there was just comments dropped and/or body language or non-verbal behavior with Ms. Durham and several of the other people that worked with Mr. Costello."

(Trial testimony of Neal Fox, the Vice President-General Merchandise Manager who was Costello's immediate superior during the two years leading up to and including his termination, RT 3562, ln. 6 to 3563, ln. 18.)

• • •

"Ms. Durham as a senior buyer and the most respected buyer in that [Costello's] division in terms of performance at every level became a mother hen in there for the young buyers and evidently and obviously, the younger people within the division came to her seeking help and guidance in terms of the difficulty they were having with their relationship with Mr. Costello.

"• • • Yes. Because in terms of discussions of this type she [Durham] was conveying to me a generalized feel as a sensitivity for John Costello's inability to cope with people and the fact that day to day she was being bombarded with individuals coming to her seeking some guidance in terms of the people relationship aspects." (Trial testimony of Neal Fox, RT 3567, ln. 8 to 3568, ln. 9.)

• • •

"A. I complained to Mr. Fox that Mr. Costello wasted a lot of my time when I would have meetings with him.

"• • • Q. And what specifically about the taking of the orders to Mr. Costello did you relate to Mr. Fox in that meeting?

"A. That it made me upset because when I would get in there to have the orders signed, instead of taking 15 minutes or 20 minutes, which would be the amount of work involved in going through the orders, that often it would take and hour, hour and a half because Mr. Costello would be taking or receiving a lot of personal phone calls.

"Q. All right. Did you tell Mr. Fox anything else about these meetings with Mr. Costello regarding the order situation?

"A. • • • I just told Mr. Fox that I had told Mr. Costello if he wants me to come back • • • That if he wanted me to come back, I would be glad to come back but I didn't want to sit there and listen to him talk about his real estate. That I really had a lot of work to do."

(Trial testimony of Diane Durham, one of the Senior Buyers who worked for Costello, RT 3277, ln. 18 to 3279, ln. 4.)

• • •

"Q. Now, with just that limitation that the court has given you, what did you tell Mr. Fox? • • •

"A. I told him about a specific incident with a vendor by the name of Yves Saint Laurent Colony Jewelry . . . That Mr. Costello spent most of the time talking on the telephone and that I was attempting to buy the line and that I had to go back and work the line when Mr. Costello wasn't with me because of all the time spent discussing other matters during my appointment that I had set up." (*Id.*, RT 3270, lns. 19-20; RT 3271, lns. 11-13, 16-20.)

• • •

Appendix F-1

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 22

AGE AS DETERMINATIVE FACTOR

In order to prove that one was discharged because of his/her age in violation of the Age Discrimination in Employment Act of 1967, one must prove more than just that age was one factor in the decision to terminate the employment relationship; it must be proven that age was the determining factor in the discharge.

In order to prove that age was the determining factor in the discharge, one must prove, by a preponderance of the evidence, that the termination would not have occurred "but for" the employer's motive to discriminate against the employee because of his/her age. In other words, if not for the employer's motive to discriminate because of the employee's age, the employee would not have been discharged.

GIVEN: .....
MODIFIED: .....
DENIED: .....
WITHDRAWN: .....

.....
UNITED STATES DISTRICT JUDGE

Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 285-286 (1977); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975).

Appendix F-2

PLAINTIFFS' INSTRUCTION NO. 36

ADEA—STANDARD OF CAUSATION

It is not necessary for a plaintiff to prove that age was the sole or exclusive reason for the defendant's decision to remove the plaintiff from his or her position. There could be more than one factor in the decision to remove the plaintiff, but the plaintiff is entitled to recover if one factor was the plaintiff's age, and age made a difference in whether the plaintiff was discharged or adversely affected in his or her employment.

[*EEOC v. Baltimore & Ohio Ry. Co.*, ... F.2d ...., 23 FEP Cases 1381, 1382 (4th Cir. 1980); *Sahadi v. Reynolds Chemical*, ... F.2d ...., 23 FEP Cases 1338, 1339-1340 (6th Cir. 1980); *Smithers v. Bailar*, ... F.2d ...., 23 FEP 1206, 1208-1211 (3rd Cir. 1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013-1014 (1st Cir. 1979); *Cleverly v. Western Electric Co.*, 594 F.2d 638, 641 (8th Cir. 1979); *Kentroti v. Frontier Airlines*, 585 F.2d 967, 969, 18 FEP Cases 364, 366 (10th Cir. 1978); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312-313 (6th Cir. 1975); *Carolan v. Central Freight Lines, Inc.*, 489 F. Supp. 941, 944, 22 FEP Cases 1593, 1595 (E.D. Tex. 1980); *Criswell v. Western Airlines*, ... F.Supp. ...., 23 FEP Cases 1511, 1513-1514 (Cent. Dis. Cal. 1979); *Scofield v. Bolts & Bolts Retail Stores, Inc.*, ... F.Supp. ....., 21 FEP Cases 1478, 1480 (S.D.N.Y. 1979); *Geller v. Markham*, 481 F.Supp. 835, 838-841 (D.C. Conn. 1979); *Olsen v. Southern Pacific Transportation Co.*, 480 F.Supp. 773, 779 (N.D. Cal. 1979); *Coates v. National Cash Register Co.*, 433 F.Supp. 655, 660, 661 (W.D. Va. 1977).]

GIVEN AS REQUESTED .....

GIVEN AS MODIFIED .....

REFUSED .....

WITHDRAWN .....

.....

UNITED STATES DISTRICT JUDGE

Appendix F-3

Defendant's Objection

(R.T. 3960:5-19)

"MR. CONNERS: Our principal complaint here, Your Honor, as to the instructions is I think they take away the heart of the defense in an age discrimination case.

THE COURT: Excuse me, Mr. Connors. Perhaps I didn't make myself clear. I was not going to invite counsel's comments with respect to those instructions I had already chosen to give. What I was going to do is give you an opportunity to invite my attention to other instructions that you would like.

MR. CONNORS: That is what I am going to do, Your Honor.

I am saying that the omission of 22, 23, 24, 24A, 24B and 26 take away the heart of the defense. That is to say that the discharge, the but for factor, is not contained in any of the instructions Your Honor proposes to give."

Appendix F-4

Plaintiffs' Objection

(R.T. 3961:25-3963:1)

Ms. De Oddone: Your Honor, we believe that the instructions regarding the standard of causation under the A.D.E.A. is something that must be included in the instructions in order to give the jury the complete statement of the obligations of the plaintiffs under the law.

The Court: To what number do you refer?

Ms. De Oddone: I am referring to a plaintiffs' 36. And if I may, I would like to read to you a statement of—from Olsen versus Southern Pacific Transportation Company, which was a decision by Judge Schwarzer of this court in which he set forth a standard of causation under the A.D.E.A. in a way that summarizes the entire line of cases from Logasus [Laugesen] to the present. Logasus is the language that is used in plaintiffs' 36.

"Plaintiff did not have to show that age was the sole ground for the decision not to transfer him." In this case it was a transfer case, "What he had to prove was that age was a determining factor in the decision, i.e., that age made a difference in the sense but for that factor the company's decision would have been different."

Now, our concern is that by failing to give such an instruction the jury will not realize that a plaintiff does not have the burden of proving that age was not the sole factor. The plaintiff does not have to prove that age was the sole factor. The plaintiff need only prove under the A.D.E.A. that age was a determining factor in the sense that I just read.

Appendix G-1

PLAINTIFFS' INSTRUCTION NO. 34

ORDER AND BURDEN OF PROOF UNDER THE ADEA

In order to establish liability for violation of the ADEA, each plaintiff bears the burden of persuading the jury of his or her claim by a preponderance of the evidence.

In proving his or her claim, each plaintiff must first establish certain initial facts by a preponderance of the evidence.

These necessary initial facts are:

1. That the plaintiff was between the ages of forty and seventy years;

2. That an adverse employment action was taken against him or her;

3. That he or she was qualified for the position held; and

4. That he or she either was replaced by a younger person or his or her functions were performed by a younger person, or produces evidence of discriminatory intent, or statistical evidence of discriminatory conduct ~~or evidence that he or she was treated more harshly than a similarly situated younger employee~~.

If you find that a plaintiff has failed to establish these initial facts, you should decide in favor of the defendant as to liability to that plaintiff.

However, if you find that the plaintiff has established by a preponderance of the evidence each of these necessary initial facts, then the defendant must offer sufficient rebuttal evidence, which may be done by giving evidence to ex-

plain or articulate a reasonable, nondiscriminatory basis for the action taken against the plaintiff. If you find that the defendant fails to state a reasonable, nondiscriminatory reason for its actions against plaintiff, you should render a verdict against the defendant as to that plaintiff.

~~However, even~~ if you find that the defendant has articulated a reasonable, nondiscriminatory basis for its actions against the plaintiff, you must render a verdict for the plaintiff if he or she establishes by a preponderance of the evidence that the defendant's reason is a pretext for age discrimination. When I use the word pretext, I mean that the defendant's action was not really based upon the reason stated.

On the other hand, if a plaintiff fails to establish by a preponderance of the evidence that the rebuttal reasons stated by the defendant were pretextual, then you should render a verdict in favor of the defendant and against that plaintiff.

Appendix G-2

PLAINTIFFS' INSTRUCTION NO. 35

DEMOTION AS VIOLATION OF ADEA

An employer may not demote an employee for reasons which violate the ADEA. Moreover, an employee need not accept such a demotion if offered.